OVERSIGHT HEARING ON ADMINISTRATION PLANS TO DRUG TEST FEDERAL WORK FORCE

JOINT HEARING

BEFORE THE

SUBCOMMITEE ON HUMAN RESOURCES

AND THE

SUBCOMMITTEE ON CIVIL SERVICE

OF THE

COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES

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OVERSIGHT HEARING ON ADMINISTRATION PLANS TO DRUG TEST FEDERAL WORK FORCE

THURSDAY, JUNE 16, 1988

House of Representatives,
Subcommittee on Human Resources
and Subcommittee on Civil Service,
Committee on Post Office and Civil Service,
Washington, DC.

The subcommittees met, pursuant to call, at 9:35 a.m., in room 311, Cannon House Office Building, Hon. Gerry Sikorski (chairman of the Subcommittee on Human Resources) presiding.

Mr. Sikorski. The subcommittees will come to order.

This is the third oversight hearing on the administration's drug testing plans. It is conducted by the Subcommittee on Human Resources jointly with the Subcommittee on Civil Service, both of the Committee on Post Office and Civil Service.

On September 15, 1986, President Reagan issued Executive Order 12564, requiring each agency to "establish a program to test for the use of illegal drugs by employees in sensitive positions." We got the OPM drug testing regulations on November 27 of that year, and HHS issued its technical guidelines for tests on February 16, 1987.

Although the administration defended its drug testing program as fair, easy to implement, and cost-effective, our oversight hearings in April and May of last year raised numerous questions. We pointed out glaring conflicts between the drug testing program and the Civil Service Reform Act, the Privacy Act, and the Rehabilitation Act. We discussed the lack of uniformity amongst the various agency programs and the failure to provide centralized oversight. We asked who, and how many people, would be tested and how much the program would cost. Perhaps most importantly, we wondered what plans the administration had for dealing with those employees who were found to have drug problems: How were they to be assisted in rendering themselves drug-free?

No answers were forthcoming, and the public attention resulting from these hearings helped contribute to swift congressional action. Language was adopted in fiscal year 1987 supplemental appropriations requiring that no money be spent on drug tests until the Secretary of Health and Human Services certifies that each agency has developed a plan which complies with Executive Order 12564 and applicable provisions of law, including criteria and procedures for designating positions to be tested, the type of drug testing proposed, and guidelines detailing standards for laboratory testing procedures.

This morning, almost a year after passage of that corrective language, we shall review the administration's response to these congressional requirements—a 4,500-page plan sent by Health and Human Services to Congress on May 3 of this year—and the mandatory guidelines for Federal work place drug testing programs published on Monday, April 11, 1988.

Now there is no disagreement that illegal drugs destroy careers, families, and human lives. They cost the United States billions of dollars. For some 12 years in public office I have been an advocate of stricter enforcement of drug laws, greater support for enforcement agencies, increased drug awareness programs, increased support for rehabilitation and employee assistance programs, and a good faith drug-free work place policy. But after another year of scrutiny and countless hours of work by executive branch officials, even amidst headlines screaming that the United States is losing the war on drugs, I remain seriously troubled by the administration's insistence that forcing hundreds of thousands of drug-free Federal employees to provide a urine sample will serve as a successful frontal attack on the evils of drug abuse.

Basic questions raised in last year's oversight hearings remain unaddressed and unanswered. The revised regulations and guidelines which I'll review today continue to smack of a quick election-year fix.

Unfortunately, the current plan fails to set specific goals, as the GAO points out, leaving us to wonder how we will measure success. If we catch a lot of Federal employees through tests showing illegal drug use, the drug testing plan can be acknowledged as a wonderful, wonderful program because it caught all these Federal employees. If it doesn't catch many Federal employees, it can be acknowledged as a wonderful, wonderful program because it deterred these Federal employees. Before we can assess the achievements of this drug testing plan, we have to have some specific goals as to what the testing plan seeks to achieve. Further, the drug testing program appears riddled with inconsistencies that provide workers in some agencies with more protection than others and include as eligible for random testing an amazingly wide range of positions.

The drug problem is real, it's complex, and it requires action, but we must not allow our desire to deal with the drug abuse problem and the associated dilemmas of crime and poverty to draw us to easy public relations answers at the expense of taxpayers and at the expense of Federal employees.

Mrs. SCHROEDER. A month ago the Administration sent us 11 large white notebooks listing each and every position which would be subject to drug testing. In requiring this listing, Congress wanted to be reassured that the program would be implemented equitably across and within agencies. It is an understatement that we were not reassured.

In some agencies, secretaries are to be tested; in most agencies, they are not. In some agencies, lawyers will fill urine cups; in others, not. The Department of Commerce has cooks being tested because who knows what a druggie chef might serve up. Commerce plans to test meteorologists, the Pentagon will not.

Within agencies, variations were wide. Apparently, the process of putting together the list of covered positions was a matter of each bureau head or installation chief submitting a list. All that agency headquarters and HHS did was to xerox and punch holes in the piece of paper.

Even the frequency of testing varies widely. Each year 50% of the designated Inspector General positions in Defense will be tested but only 2% of the Defense Contract Audit Agency positions will be tested. Are IG's more notorious drug abusers than contract auditors? Is the IG's function more important?

Many of the designated jobs, of course, involve people who have a direct effect on the health or safety of others: air traffic controllers, motor vehicle operators, and nuclear power plant operators. Nobody can argue with the proposition that these employees must be drug free.

I fear, however, that urinalysis will become the primary means used to ensure that these people are not coming to work impaired. Urinalysis is completely useless in determining impairment. It merely identifies the remnants of the drug after it has been consumed by the body. There is no urine test which can show impairment. This much touted drug testing program may well reduce public safety by convincing supervisors that it is no longer their job to make sure that these employees are not impaired at work.

The most serious issue posed by drug testing is what it does to the quality of the workforce. Earlier this week, the Subcommittee on Civil Service heard testimony from the Office of Personnel Management about how difficult it is to recruit good people to work for the federal government. We're all aware of the brain drain hitting the government as talented and experienced workers decide they've had enough of declining real pay, abuse from political leaders, and disrespect from their neighbors. We know the polls showing that young people do not want to come into the federal government. Requiring employees to urinate into a bottle in front of a monitor who will check the color and temperature of the urine is grossly offensive. By establishing widespread drug testing, we are ensuring that our recruitment and retention problems will just grow worse.

I want to say how honored I am to be cochairing this hearing with the gentleman from Minnesota, Mr. Sikorski.

Mr. SIKORSKI. Thank you. The honor is mine.

We'll begin with our first witness, who is L. Nye Stevens, Associate Director of the General Government Division of the General Accounting Office.

GAO has closely monitored the administration's drug testing efforts since the President issued his Executive Order in 1986 which mandates drug testing for Federal employees. Mr. Stevens testified before this subcommittee last spring. We are happy to have him back to present GAO's latest analysis. Mr. Stevens is accompanied by Tom Beall and Dick Caradine of the General Government Division.

Mr. Stevens, do you want to give your testimony?

STATEMENT OF L. NYE STEVENS, ASSOCIATE DIRECTOR, GENERAL GOVERNMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY TOM BEALL AND DICK CARADINE

Mr. STEVENS. Yes. With your permission, Mr. Chairman since it is a fairly long statement, I'll just summarize it and hit the high points in about five minutes and elaborate on anything in the written statement that you would like.

Mr. SIKORSKI. Without objection, your full statement will be put in the record.

Mr. STEVENS. Thank you very much.

We looked at 21 drug testing plans that were submitted early last month to the Congress from the 11 civilian departments at the Cabinet level of government. The agency plans, in our view, provide a good deal of additional detail about drug testing plans and programs, but they still don't fully resolve the concerns that we mentioned to you in last year's testimony about the uniformity of the programs across government, about employee rights or protections, program costs, and oversight.

I'd like to deal first with the issue of uniformity across Government. In last year's testimony, we pointed out that equity and fairness seem to indicate that if Federal employees are to be subject to drug testing programs all Federal employees should be treated as consistently as possible. Our analysis of these plans, however, indicates that individual employees are going to face quite different circumstances, depending on which agency is their employer. Let me cite some examples.

The proportion of the work force that is designated for testing ranges from less than 1 percent at the Internal Revenue Service to a quarter of the work force at the Department of the Interior to just about half at the State Department, all the way up to 100 percent of the work force at the Department of Justice's Marshals Service.

The annual frequency at which designated employees would be tested also showed a considerable range, from 4 percent at the U.S. Mint and 5 percent at the Commerce Department, all the way up, again, to 100 percent, this time at the Department of Education. In other words, designated employees at the Mint, at the low end, have a 1 in 25 chance of being tested in any one year while all designated employees at the Department of Education can be expected to be tested each year.

Also, it is clear that some positions will be tested at one agency but not another. For example, positions such as clerk-typist, cook, teacher, counselor have been identified as subject to testing at some agencies, but the same positions in other agencies have not.

We found that applicant testing, post-accident testing, and follow-up testing are also not uniform. For example, in post-accident testing one criterion for requiring a drug test is the amount of damage that might be done to property in an accident. This varies from $200 in the Marshals Service plan to $10,000 in the Department of Agriculture's plan.

It also appears that under some plans employees will be screened for fewer drugs than in other agencies. The majority of the agencies follow the HHS technical guidelines in specifying five specific drugs, but random testing at three agencies—which are HHS, the Department of Housing and Urban Development, and the Savings Bond Division of the Treasury Department—will be limited to marijuana and cocaine.

Taken as a whole—and there are other examples—these differences in major components of the testing programs indicate two things: one, that uniform criteria will not be applied to all Federal workers and that employees will be treated dissimilarly, depending on where they work.

There are also some unanswered questions regarding employee rights and protections, as you mentioned, Mr. Chairman, in your statement. We have identified several areas where it is not clear what actions an agency or an employee may take under circumstances that will probably arise in the operation of the program. In a section concerning the procedure to be followed if an employee believes that his or her position has been wrongly classified as subject to random testing, eight of the plans did not identify the official who would deal with the employee's request for reconsideration.

All of the plans require that an employee who has a confirmed positive test be disciplined. For the most part, the plans follow the OPM guidelines closely by citing a specific list of disciplinary actions that an agency may take upon the first confirmed positive test, but there are no criteria for selecting appropriate punishment from that list. There is one exception to that statement, and that is the U.S. Marshals Plan which specifies that removal will be proposed for a first finding of illegal drug use.

Agency drug testing plans also do not discuss how the program implementation will be affected by requirements to observe the Civil Service Reform Act and the Rehabilitation Act of 1973. The plans make no specific reference to the Rehabilitation Act, and the CSRA stipulation that an agency taking a disciplinary action against an employee must demonstrate a nexus or a connection between the employee's off-duty conduct and his job performance, that's just not discussed.

We note also that the plans do not tell applicants how to challenge a verified drug test result if they want to. In the absence of further specificity in the plans, we remain concerned about how employees and applicants will be assured the rights and protections provided by law.

A review of the OMB cost figures that accompanied the plan showed notable variations in drug program costs across agencies. OMB's guidance to the agencies suggested that 5 percent, or less, of the tested population will prove positive for drug use. Based on this 5 percent estimate, we calculate that the agencies' total cost per identified drug user in fiscal year 1990 to range from $3,400 at the State Department up to $13,000 at the Treasury Department. If less than 5 percent of the tested population were found to be positive—and I believe the preliminary figures from the Department of Transportation's ongoing test program are about 1 percent—then the cost per identified drug user would, of course, be higher than the 5 percent estimate would lead you to.

Except for the HHS role in the certification and review of laboratories which was strengthened by the appropriations law, there is still no provision, in our view, for continuing oversight or independent monitoring of drug testing programs Government-wide.

While agency plans provide for the collection of statistics, there is no discussion of how these statistics are to be used in evaluating the effectiveness or efficiency of the program, determining whether it is working or not. Also, there is no requirement to report the number of employees that are terminated after either a first confirmed positive drug test or after a second confirmed positive drug test. Those would be very useful indicators, it seems to me, for evaluating the program.

So based on the differences we have identified in the agency plans as well as the variances in program costs across agencies, we believe that continuing centralized oversight would be valuable in helping to ensure that employees are treated equitably, that agencies comply with the guidelines, and that any modifications that are needed in the program are identified and put into place as it moves forward.

That concludes the prepared comments I have, Mr. Chairman and Madam Chairwoman, and my colleagues and I would be glad to respond to any questions you have.

[The statement of Mr. Stevens follows:]

Statement of
L. Nye Stevens, Associate Director
General Government Division

Mr. Chairman, Madam Chairwoman, and Members of the Subcommittees, it is a pleasure to appear before you today to comment on the federal employee drug testing plans submitted to Congress in accordance with Section 503 of the Supplemental Appropriations Act of 1987, Public Law 100-71. This is the third time we have testified on the issue of federal employee drug testing. In September 1986 testimony before the Subcommittee on Human Resources we commented on, among other things, constitutional issues raised by the random drug testing program described in the President's Executive Order 12564 which authorized drug testing of federal employees. We continue to believe that these issues will ultimately be decided by the courts as we noted in that testimony.

We testified again before the Human Resources Subcommittee in May 1987 on concerns raised by our review of the drug testing guidelines issued to agencies by the Office of Personnel Management (OPM) and the Department of Health and Human Services (HHS) as required by the Executive Order. These concerns focused on four areas:

-- the potential for programs to vary across agencies resulting in dissimilar treatment of employees,

-- employee rights were not fully addressed,

-- no provision existed for continuing, centralized oversight, and

-- program costs were unknown.

Section 503 of the Supplemental Appropriations Act of 1987 required that HHS submit to Congress an agency-by-agency analysis of agency drug testing plans and a certification that the plans were developed in accordance with Executive Order 12564 and applicable provisions of law. The HHS report submitted to Congress last month in compliance with Section 503 included the agency drug testing plans.

Today's testimony provides the results of our review of the 21 drug testing plans prepared by the 11 civilian Cabinet level departments. Two departments, Justice and Treasury, prepared separate plans for different agency components.

In order to provide guidance to agencies in the development of their plans, an Interagency Coordinating Group was established under the aegis of the National Drug Policy Board. This group developed a model plan to guide the agencies in the preparation of their individual plans.

In general, the agency plans follow this model plan, and as a result they are similar in wording. While the agency plans provide much additional detail about the drug testing programs, they still do not fully resolve the concerns we raised last year about the uniformity of the programs, employee rights or protections, program costs, and oversight.

Uniformity of drug testing programs

In our testimony last year we discussed the wide latitude provided agencies in determining what positions will be subject to testing, and the possibility that employees in one agency may be tested while employees holding similar positions in another agency may not. We pointed out that equity and fairness seemed to dictate that if federal employees are to be subject to drug testing programs which are intrusive, all federal employees should be treated as consistently as possible.

Our analysis of the plans indicate that individuals will face a different set of testing circumstances depending on which agency is their employer. Employees who occupy testing designated positions, known as TDPs, will be subject to random testing. Drug testing plans show considerable variation in the TDPs identified and the frequency with which these TDPs will be tested annually. Across the plans we reviewed, the proportion of the workforce designated as occupying TDPs ranged from less than 1 percent at the Department of Treasury's Bureau of Public Debt to 100 percent at the Department of Justice's U.S. Marshals Service.

Our preliminary review of selected TDPs suggests that positions in one plan have been identified as TDPs while similar positions in another plan have not. For example, clerk typist positions having a critical-sensitive designation are identified as TDPs at the Department of Commerce. This designation is one of four categories used to classify positions in terms of national security risk. At HHS, this designation does not constitute a basis for identifying the position as a TDP. Other positions such as cook, teacher, and counselor have also been identified as TDPs in one agency but not in another.

The annual frequency at which TDP employees would be tested also varies. Since the reported rate of annual testing ranges from 4 percent to 100 percent, TDP employees will not be tested at a uniform rate governmentwide. For example, TDP employees at the U.S. Mint have a one in 25 chance of being tested annually while TDP employees at the Department of Education can expect to be tested once a year. The plans do not contain an explanation of how the frequency of testing was determined.

Applicant testing, post-accident testing, and follow-up testing are also not uniform. While the majority of plans indicate that only applicants for TDPs will be tested, five plans call for the testing of all applicants, and one plan does not include any applicant testing. For post-accident testing, one criterion for requiring a drug test is the amount of damage done to property. Depending on the agency, this monetary threshold has been set at values ranging from 200 dollars at the U.S. Marshals Service to 10,000 dollars at the Department of Agriculture.

All employees who are administratively referred to an employee assistance program for illegal drug use and complete a rehabilitation program are subject to follow-up testing. The period of time that employees are subject to this follow-up testing and the frequency with which employees will be tested during this period show significant differences. While the majority of plans set the duration of the follow-up testing period at one year, the Department of Agriculture stipulates that the period will last at least two years with no indication what the maximum period might be. The specified rate at which follow-up testing will be done ranges across agency plans from once a month to three times in two years.

Employees within the same agency could also be subject to different rates of follow-up testing. There are plans that specify the minimum rate at which follow-up testing is to be done on employees but do not indicate what the maximum rate of testing would be. There are plans which stipulate that the rate of testing will be established on an individual case by case basis.

It appears that applicants and employees under some plans will be screened for fewer drugs than in other agencies. The majority of agencies plan to test for the five drugs -- marijuana, cocaine, opiates, amphetamines, and phencyclidine -- specifically authorized in the HHS technical guidelines. However, random testing at the Department of Housing and Urban Development as well as random and applicant testing at HHS and the Department of Treasury's Savings Bond Division will be limited to marijuana and cocaine. The Treasury's Bureau of the Public Debt will test for four of the authorized drugs but not amphetamines.

Taken as a whole, these differences in major components of the testing programs indicate that uniform testing criteria will not be applied to all federal workers and that employees will be treated dissimilarly. The differences among agencies might be explained by the need for agency heads to exercise discretion in tailoring their agency's plans to meet specific needs. However, the HHS analysis of the plans did not address the rationales for the differences and, thus, we could not examine them.

Employee Rights and Protections

Agency plans contain provisions regarding protection of employees' rights. The confidentiality of test results and restrictions on disclosure as promulgated in Section 503 of the Supplemental Appropriations Act are specifically identified and addressed in the agency plans. However, the lack of detail or specificity regarding policies or procedures for certain other aspects of the plans continues to raise questions about how employees and applicants will be treated. We have identified several areas where it is not clear what actions an agency or an employee may take under circumstances that will probably arise in the operation of the program.

Agency plans include a section concerning the procedure to be followed if an employee believes that his or her position has been wrongly classified as a TDP subject to random testing. Eight plans, while noting the procedure for seeking administrative relief from this classification, did not identify the official who should receive and approve the employee's request for reconsideration.

Agency plans require that an employee who has a confirmed positive drug test be disciplined. For the most part, the plans follow the OPM guidelines closely by citing a specific list of disciplinary actions that an agency may take upon the first confirmed determination that an employee uses illegal drugs. The actions range in severity from a written reprimand to removing the employee from service. The Department of the Interior and HHS included the additional option of demotion as one of the explicit disciplinary actions that may be taken against an employee. All plans with the exception of HHS's included the option of suspending the employee until the employee successfully completes the rehabilitation program.

As we noted in previous testimony, the OPM guidelines did not provide any criteria to apply in determining the choice of which disciplinary action to take except that it should be consistent with the Civil Service Reform Act. With the exception of the U.S. Marshals' plan, which specifies that removal shall be proposed for a first finding of illegal drug use, agency plans do not provide any criteria as to what particular disciplinary action will be taken against an employee on the basis of a first time, confirmed positive test.

Agency drug testing plans do not discuss how program implementation will be affected by requirements to observe employee rights under the Civil Service Reform Act (CSRA) or the Rehabilitation Act of 1973. In our previous testimony, we expressed concern that the OPM drug testing guidelines did not address the CSRA stipulation that an agency taking a disciplinary action demonstrate a nexus or connection between the employee's off duty conduct and job performance. There is no discussion of this issue in the drug testing plans. This would apply to those individuals who tested positive and those refusing to take the test since the latter are treated as if they tested positive.

Additionally, the plans make no specific reference to the Rehabilitation Act, which may also protect employees who are drug abusers from adverse actions such as discharge unless the agency can show impairment of the employee's job performance or a direct threat to property or the safety of others.

Some of the plans could also reduce protections provided in the Drug Abuse Office and Treatment Act. That Act prohibits individuals from being denied or deprived of federal civilian employment solely on the basis of prior drug abuse. This protection does not apply if the position is determined by the agency to be a sensitive position. All the plans state that all positions designated as TDPs are sensitive positions. Under the U.S. Marshals Service plan, everybody in the agency has been defined as occupying a sensitive position, including clerical employees. Thus, many employees under that plan would be excluded from the protections provided even though their counterparts at other agencies would not.

In the absence of further specificity in the plans, we remain concerned about how employees will be assured the rights and protections provided by law. The plans do include provisions for employee access to their drug test results and relevant laboratory certification and review records as required in Section 503 of the Supplemental Appropriations Act.

Applicants, however, are not afforded access to these records under the plans even though they would appear to have a right of access under the Privacy Act and/or the Freedom of Information Act. The potential for laboratory error is no different for applicant testing than for employee testing, and there is no rationale presented in the plans for not providing these rights to applicants. We note also that the plans do not establish or describe procedures for applicants to follow if they choose to challenge a verified drug test result.

Program Costs

Estimates of program costs were prepared by the Office of Management and Budget (OMB) and submitted to Congress in accordance with Section 503 of the Supplemental Appropriations Act. The cost estimates provided by OMB are divided into two categories, testing related costs and other costs. Testing related costs include expenses for such things as specimen collection, laboratory analysis, medical review officers, and quality control. The non-test, or other, cost category includes employee education, supervisory training, and program administration.

Our review of OMB figures showed notable variations in drug program costs across agencies. OMB's guidance to agencies suggested that 5 percent or less of the tested population will test positive for drug use. Based on this 5 percent estimate, we calculate the agency's total cost per identified drug user in FY 1990 to range from 3,400 dollars at the State Department to 13,000 dollars at the Treasury Department. If less than 5 percent of the tested population were found to be positive, cost per identified drug user would be higher.

We found that test costs per person tested generally averaged around 63 dollars at almost every agency in the scope of our review. However, non-test costs per agency employee varied from roughly 4 dollars at the Department of Agriculture to 13 dollars at the Department of State.

It is important to note that the OMB estimates may not reflect the total costs associated with the drug testing programs. For example, neither the cost of employee assistance programs nor the cost of adverse actions was included in agency estimates according to OMB officials. In addition, the OMB estimates may not include cost of accident and reasonable suspicion testing since the cost of these components of the program were not requested in the OMB guidance.

Neither the OMB cost data nor the plans provided sufficient detail to explain the basis for the cost estimates or the variances. If it is of interest to the Subcommittees, the basis for these estimates can be the focus of future work.

Oversight Needed

Except for the HHS role in the certification and review of laboratories, there is no provision for continuing oversight or independent monitoring of drug testing programs governmentwide. While agency plans provide for the collection of statistics, there is no discussion of how they are to be used in evaluating the effectiveness or efficiency of the program in reaching its objective of a drug free workplace.

We note that among the statistics to be reported, two relevant statistics are not explicitly included in the statistical reporting plans: the number of employees terminated either after a first confirmed positive drug test or after a second confirmed positive test. The Department of Housing and Urban Development plan does include terminations for confirmed positive tests in the collection of statistical information, but does not distinguish between a first or second occurrence.

Based on the differences we have identified in the agency plans as well as the variances in program costs across agencies, we believe that continuing, centralized oversight would be valuable in assuring the best use of resources.

This concludes my comments. My colleagues and I would be pleased to answer questions you may have.

Mr. SIKORSKI. Chairwoman Schroeder will begin the questions.

Mrs. SCHROEDER. We thank you very much for your testimony.

I guess there are a few things where I want to make sure I understand what you are saying. I am troubled in that I would like to know what the results of all the testing have been, so whether or not what it costs and everything is really worth the expenditure.

Before we started testing, I didn't know anyone who was out there saying that Federal employees were large users of drugs, and so therefore this is a really highly suspect group that we must get at. But you are telling me there aren't any statistics, so we don't know.

Mr. STEVENS. There are some very preliminary ones from the Department of Transportation's drug testing program, which primarily relates to Federal Aviation Administration air traffic controllers, and I'm told, although it is certainly preliminary data, that the hit rate is in the 1 percent range rather than the 5 percent range that OMB guidelines called for in their estimates with regard to the cost estimates. But that's really all there is so far, and that's very preliminary.

Mrs. SCHROEDER. But you also testified there's no real oversight as to what is happening.

When an agency does these tests, they don't report the results to anybody in particular, do they?

Mr. STEVENS. There is a requirement in the HHS guidelines that some statistics be collected and, by implication, that they be given to HHS, but there is no indication of how they will be used, to determine whether the program is effective or not, to determine whether there are changes needed, to determine cost-effectiveness, as you mentioned. It is, in our view, a fairly major gap in Government-wide control and management of what is quite an intrusive procedure.

Mrs. SCHROEDER. So it's like we're on our way to somewhere, but we don't know where, and we're not really looking at where we are.

Mr. STEVENS. That's a fair summary.

Mrs. SCHROEDER. It's rather troubling.

Is HHS having trouble collecting the data, or do they even pursue it if it doesn't come in? I mean is there anyone really in charge? Is there someone at HHS we could have come testify that could tell us, "Agencies are reporting it on time; this is what they're finding?" Is there someone home? I mean is there someone we can find out this information from?

Mr. STEVENS. At the moment, it is still prospective, so there is no information on operating programs Government-wide, because they simply haven't taken place, and there are court challenges, as you know.

In the long run, there may be, and perhaps Dr. Walsh can respond to that, but it is not in the plans that have been submitted to the Congress. There is no indication to you or to us that there is a long-term monitoring and evaluation effort with regard to drug testing programs in the civilian sector Government-wide.

Mrs. SCHROEDER. Then let me ask another question then. Do you think that the assumptions used by the Office of Management and

Budget in reaching the $15 million cost figure are accurate? What are they making the assumptions on?

Mr. **Stevens**. It is difficult to say, because they are fairly unspecific. We have asked OMB, in the fairly short time that was available for us to analyze these, for some more detail on them. We have not been able to see yet what the agencies themselves submitted to OMB that became the basis for OMB's calculation of the estimates.

Perhaps Mr. Beall can respond a little more specifically with regard to some of the numbers.

Mr. **Beall**. In terms of our conversations with OMB, we have determined that the costs of the employee assistance programs are not included in the OMB estimates.

Mrs. **Schroeder**. The costs of the what?

Mr. **Beall**. The employee assistance programs, the EAP's.

Mrs. **Schroeder**. Okay.

Mr. **Beall**. Upon the first finding of drug abuse, an employee would be referred to one of these, as required in most of the plans—in fact, in all of the plans. So that the costs that would be associated with that are not factored into the OMB estimates. At this point, I think it is unknown how many people would be referred.

Also, the costs associated with any of the adverse actions that would be taken. In other words, upon the first finding of a confirmed drug use, the employees will also be subject to a disciplinary action. The costs associated with processing those actions, any appeals that might be made, those costs are not estimated in there either.

Mrs. **Schroeder**. What did they estimate then? Just the costs of doing the testing and the lab work?

Mr. **Beall**. They broke their costs into two major categories, one of which was direct test-related costs, which are specimen collection, testing the specimens, the medical review officers, things that were very directly tied to the actual drug testing process, and the other component was the non-test-related costs of training supervisors, administration of the program, and that sort of thing.

Mrs. **Schroeder**. But the broad diversity that was testified to on how each agency is implemented this, how can they get those costs? I mean if the Department of Education is testing everybody that is designated every year and others aren't, I still don't see how you get those costs.

Mr. **Stevens**. It's a very good question, and it's one that we believe further work needs to be done on. We certainly don't claim to have the answers yet or even that we've gotten very satisfactory information from OMB on a Government-wide basis.

We have noticed a few cases where there were some cost figures in the plans that were submitted to Congress by individual agencies, and there was a difference between those and the estimates that OMB submitted for the same agencies as part of their overall reporting. We don't know the reason for that. We would agree that a good deal more needs to be done to find that out, but it's not known right now.

Mrs. **Schroeder**. Did you look very closely at the HHS program for how they test their own employees, and would you be able to tell us if that meets their own certification process—what they require?

Mr. STEVENS. There are some differences between the HHS programs and the other ones. I think they test for fewer drugs, for instance.

Mrs. SCHROEDER. So they are asking others to test for more drugs than they themselves test for. Is that what you are saying?

Mr. STEVENS. They are specifying five drugs, but there is some permissiveness with regard to what the agencies can choose, and HHS has chosen fewer than others. But I think another agency would be able to do exactly what HHS has done.

Another way they are different is that they have designated a smaller proportion of the work force than many of the other agencies for testing.

Mrs. SCHROEDER. Let's go back and look at the Supplemental Appropriations Act and the language in there. What you are telling me is, there is a tremendous lack of uniformity among the different agencies—right?

Mr. STEVENS. It's not tremendous, and one reason it is not tremendous is that there was a model plan, a sort of boilerplate that covers many of the features, and I think we have pointed out that there are a number of discretionary areas in which the agencies do differ.

Mrs. SCHROEDER. And even the agency putting out the certification doesn't hit the high points in their certification process.

Mr. STEVENS. There are some areas where we found that the HHS certification, which was really quite brief and, again, followed a pattern, ignored some real differences among the plans and some caveats that were there, if you look at the individual plans themselves.

Mrs. SCHROEDER. Do you think that lack of uniformity then would violate the Supplemental Appropriations Act that was passed or not?

Mr. STEVENS. The way the act is characterized—and this is true even in the OMB submission to the Congress in describing what section 503 was meant to achieve—did talk about achieving uniformity of treatment for Federal employees across the work force, and certainly the legislative history speaks to the same point.

I'm not a lawyer, but I didn't actually find a requirement in section 503 that there has to be absolute uniformity among agencies. We do think that equity and fairness would indicate that employees who are similarly situated in the Federal Government ought to be treated predictably and with some confidence that they are not being singled out for differential treatment.

Mrs. SCHROEDER. I certainly think that was the Congress' intent, and so I find what you are saying here a little surprising, because I think we had intended to have more uniformity than what appears to be going on out there.

I thank you very much, and I am going to have to leave in a little bit, because we have an arms control conference with the Senate, but I'll try and get back, and I really appreciate your looking into it.

Thank you, Mr. Chairman, for yielding. You are very kind.

Mr. SIKORSKI. Thank you.

Your conclusions are not unimportant. In fact, they are pretty strong and bothersome. You say that a uniform set of testing criteria will not be applied to the Federal work force. You say that agency plans do not detail certain aspects of employee rights and agency disciplinary actions. You say that the OMB cost estimates show notable variances among agencies, and you say that no provision exists for centralized continuing oversight of the drug testing programs.

In summary then, there is no continuing oversight provision made, and there is no clear cost estimate, at least so far as we can find. We are going to ask you, and we expect the Civil Service Subcommittee, too, will ask you to help us in a further review of the costs.

No continuing oversight, no hand-on costs, employee rights unprotected, and no uniformity—those are major concerns, and it seems that we are no further towards a reasonable testing procedure than we were a year ago.

The first aspect of the variances between the agencies plans: You pointed out there are differences in how an employee in one agency and an employee in another agency are treated. There are differences in chances of being tested. The same position can have a one in 25 chance of being tested in one agency while it's completely different in another agency, and no supporting reasoning for that difference is given. There are differences in the positions to be tested. In one agency a certain position doesn't get randomly tested while in another agency it does. There are differences in the accident and post-accident testing, differences in the drugs that are being tested. HHS' guidelines say that five drugs are what most agencies test for, but their own testing program only tests for marijuana and cocaine.

Now these differences might be, as you suggest, explained by the need for agency heads to exercise discretion in tailoring their agency plans to meet specific needs. However, the HHS analysis of the plans did not address the rationale for the differences. There might be a reasonable argument for Agency A to test different positions than are tested in Agency Y, but we can't know those reasons if we're given no rationale. We can't judge whether there is a rational reason to discriminate between those two employees. Is that correct?

Mr. STEVENS. That is right. The certification was quite skimpy and looked a good deal like boilerplate. If you go through it agency by agency, they provided the same facts about each one, but no rationale for quite apparent differences that there were among the plans.

Mr. SIKORSKI. Was it your testimony that pointed out that a space assignment person in the Justice Department is going to be randomly tested because of the possibility for excess space rental.

Mr. STEVENS. I think that was Lois Williams' statement, which I read recently. I thought she had some very good points and examples in there.

Mr. SIKORSKI. They rationalized random drug testing of a space assignment person because if the space isn't assigned correctly, it could be very costly.

Mr. STEVENS. If the person doing the space were spaced out, it would be quite a problem.

Mr. SIKORSKI. You can thank me for providing your straight man. [Laughter.]

Mr. SIKORSKI. Now there is also a difference in the procedure for seeking administrative relief for a position's classification. If a particular employee in the random testing group wants to challenge their testing designated position eight agency plans do not identify the official that should receive the request and approve the employee's request for reconsideration. Is that correct?

Mr. STEVENS. That is correct; yes, sir.

Mr. SIKORSKI. This certainly should be clarified before testing begins.

Mr. STEVENS. Certainly, if I were one of those employees, I would want to know whom I talk to, to question the placement of my job.

Mr. SIKORSKI. If that person wins the reconsideration, do other people similarly situated in that agency automatically get reconsidered?

Mr. STEVENS. There is no such provision one way or another, sir.

Mr. SIKORSKI. Agency plans do not provide any criteria as to what particular disciplinary action should be taken against an employee on the basis of a first time confirmed positive test. I think it ranges from no action to immediate dismissal.

Mr. STEVENS. Yes, sir, and one agency does provide criteria, and the option is dismissal. That is the Marshals Service.

Mr. SIKORSKI. The Marshals Service plan seems to fly in the face of the President's Executive Order which states that that no one will be terminated if they test positive.

Mr. STEVENS. Yes, sir, I believe so.

Mr. SIKORSKI. In your testimony, you note a considerable variance in the costs, and maybe we should focus on that. I found that quite interesting. What page was that on? Ten.

The costs vary anywhere from $3,400 to $13,000 for each identified drug user.

Mr. STEVENS. That deserves some qualification, Mr. Chairman, because that is based upon the OMB guidelines estimate that perhaps 5 percent of the work force would turn out to test positive. If the actual rate in practice is more like what the Department of Transportation has found in their ongoing program of 1 percent, those numbers would be greatly escalated, of course, per drug user; they might be five times as high.

Mr. SIKORSKI. Please say the difference again. I didn't catch the first number.

Mr. STEVENS. The OMB estimate in the guidelines was—and certainly it is just for planning purposes, but they estimated that 5 percent of the work force would be identified with positive drug tests.

The Department of Transportation's initial experience, we are told, is 1 percent. The calculations we did on the basis of 5 percent of the costs per identified drug user would be perhaps as high as five times these numbers if the Department of Transportation experience is projectable to the rest of the Government. Of course, we don't know that yet.

Mr. SIKORSKI. Therefore, there are two points on the table. The first point is that you have a cost of at least $3,400 per identified drug user. This is for the testing only and does not include what happens after the positive test.

Mr. CARADINE. This is all costs associated with the program that are included in the OMB estimates.

Mr. SIKORSKI. It includes all costs associated with the random drug testing program, but it does not include the costs for rehabilitation.

Mr. CARADINE. No, not rehabilitation.

Mr. SIKORSKI. What you do with an identified positive test. Is that correct?

Mr. CARADINE. That is correct, but it does include the non-test-related costs, such as——

Mr. SIKORSKI. The Helping Hand and the outreach programs.

Mr. CARADINE. Education.

Mr. SIKORSKI. Okay. So it includes the random drug testing program, which includes some outreach and education programs up front. Once someone is identified though, it doesn't include the costs of rehabilitation, but it does include, I presume, the cost of disciplinary action.

Mr. CARADINE. As part of the program administration costs, yes.

Mr. SIKORSKI. Okay. So we have a $3,400 range at the State Department to $13,000 at the Treasury Department and there is no rationale so far for the difference in those two costs.

Mr. STEVENS. No, sir, not in what HHS has given the Congress so far.

Mr. SIKORSKI. The other point you made is that if OMB is right and 5 percent of the Federal work force is tested positive for illegal drug use—which seems quite high and high compared to DOT's preliminary figures of 1 percent—then the costs could be five times as much. You already have a range of three, to four, to one, for the costs per person, and those could be quintupled, if that is the word.

Mr. CARADINE. Our calculations would show the costs range from $17,000 to about $65,000.

Mr. SIKORSKI. Fifteen thousand to sixty-five thousand.

Mr. CARADINE. Seventeen thousand to sixty-five.

Mr. SIKORSKI. Seventeen thousand to sixty-five thousand per identified drug user in the Federal work force, and that doesn't begin to deal with the rehabilitation issue.

Mr. STEVENS. Yes, sir.

Mr. SIKORSKI. The non-test costs for agency employees varied from roughly $4 at the Department of Agriculture to $13 at the Department of State. Is there any reason that the State is high on the non-test program costs and low on the program test costs?

Mr. STEVENS. None is given. They are good questions to ask. We would like to follow up on those and find out what the rationales are for those differences. The agencies show a great deal of variation in the non-test versus the directly test related costs. Some are just turned over from one another.

Mr. SIKORSKI. How are employee rights and procedural rights going to be protected or can they be better protected in this program?

Mr. STEVENS. The way in which the Civil Service Reform Act's requirement that a nexus or a connection between off-duty conduct and on-duty job performance will be applied in the disciplinary actions is unstated. In our view, that is probably the principal problem with regard to the plans. They simply say that the requirements of the Civil Service Reform Act will be observed, but there is no detail of how that very difficult determination will be made.

Mr. SIKORSKI. So we have got three acts here: the Privacy Act, which apparently there has been a major step towards responding to; the Rehabilitation Act; and the Civil Service Reform Act. So the language is waived, but there is no attempt to go beyond the statement that the Civil Service Reform Act will be observed or be compatible—because that calls for the nexus between someone's actions on the job and their actions off the job—illegal drug use and performance.

Mr. STEVENS. That is a very difficult problem, but it is not one that the plans attempt to address.

Mr. SIKORSKI. Doesn't the supplemental appropriation language specifically say that the drug program has to be compatible with the Civil Service Reform Act?

Mr. STEVENS. Yes, and that is certified in the plans—certification to that effect, but no description of how the key determination there will be reached or the criteria will be reached.

Mr. SIKORSKI. But there is no basis for the certification that you can see.

Mr. STEVENS. Not in the plans themselves.

Mr. SIKORSKI. So, again, the plans are certified that they meet the supplemental restatement of the law—that is, that the Civil Service Reform Act remains in existence and an employee has certain protections, and they can't be disciplined for something that occurs off the job and does not affect their performance.

Mr. STEVENS. I think there is no question, that is going to be a heavily litigated subject in the future, and probably the executive branch doesn't have a very clear plan of action as to how it will be addressed.

Mr. SIKORSKI. I expect that will be and it is heavily litigated, but we, as a Congress, restated that principle last year, and apparently the only way around it is by blanket certification language without proof or support and without practical details showing how that compatibility occurs.

Two last questions. Who should be responsible for the continuing oversight of this program?

Mr. STEVENS. In our view, I think the most appropriate place is probably the Office of Personnel Management—you might ask that question of Mrs. Horner—especially as the questions move towards those of employee assistance, employee rehabilitation, and disciplinary actions. These are matters over which OPM has traditionally had primary oversight.

Mr. SIKORSKI. And what statistics should the Government collect in order to create an effective oversight program?

Mr. CARADINE. We cited some examples in the statement. I think several other examples would be information concerning disciplinary actions that are taken since the agencies' plans do have a disparity in terms of the actions they may take. Statistics like that would provide the Congress, HHS, as well as OPM with actual data as to what the agencies are doing, which might indicate, for example, that the agencies need further guidance.

Mr. **Sikorski**. If you could provide the subcommittees with that, it would be helpful. Also, the subcommittees ask you to do the cost analysis that you suggest, and we will do a write-in from the two subcommittees.

[The following information was furnished:]

Drug Testing Statistics

Examples of other statistics that would assist oversight of federal employee drug testing programs include:

The number of verified positive test results for each type of test, i.e., random tests, reasonable suspicion tests, accident or unsafe practice tests, follow-up tests, and applicant tests;

The number of verified positive test results for each type drug, i.e., marijuana, cocaine, opiates, amphetamines, and PCP;

The number of written reprimands resulting from a first finding of illegal drug use;

The number of employees placed on enforced leave as a result of a first finding of illegal drug use and the range and average length of time employees spend in enforced leave status;

The number of employees suspended as a result of a first finding of illegal drug use and the range and average length of time employees are suspended;

The number of employees removed from service as a result of a first finding of illegal drug use; and

The number of employees removed from service as a result of a second finding of illegal drug use.

Mr. **Sikorski**. Again, you talk about the lack of uniformity, employee rights that aren't protected, no apparent handle on costs, and no continuing oversight; those are four glaring problems that exist.

I would like to recognize the gentleman from New York, who has long been involved in these Civil Service matters and the fight against drug abuse, thank him for his presence, and turn over the time to him.

Mr. **Gilman**. Thank you, Mr. Chairman. I will try to be brief.

First of all, I want you to know that I think we all appreciate the opportunity to take a good, hard look at this important issue, a matter that is critical to the entire problems of narcotics abuse that our Nation is confronted with.

The more that our Select Committee on Narcotics explores and examines the narcotics problem, the more we recognize all of the complexities, and the extensiveness, and the overwhelming odds that we have in battling this crisis, and it is one that is not just national in scope but, as we all know, is international in scope. The President just several years ago declared narcotics abuse and trafficking a national security issue to enable us to bring in more military involvement with regard to confronting this problem. Drug abuse in the work place has been burgeoning as never before, and its impact on our society is growing each and every year.

Some of us had the opportunity, Mr. Chairman, of attending a Drug-Free Work Place Conference, it was called, which was convened in Washington just last week, and the President gave the keynote address to some 300 or 400 chief executive officers of our leading corporations who are confronted with some of the very same problems that we are confronted with in the public sector of how to go about making certain that co-employees are protected, to try to protect the employees' rights at the same time, to try to have a fair method of ridding the work place of narcotics abuse, some of whom were confronted with as much as a 50 percent drug abuse in the work place.

One corporation, a major corporation, an auto manufacturer, testified that it was costing his company over $1 billion in one year of health costs that are drug-related in loss of productivity and absenteeism and in accidents within their own area.

So I do think that there are certainly some benefits in having an appropriate drug testing program, but it has to be a fair program, it has to be an equitable one, it has to be one with good criteria, and certainly I'm sure that GAO can help us weed out some of these improprieties, and it is for that reason we welcome having them before us today.

If a Federal employee holds a job in which there are some split-second decisions that could cost people their lives, I don't think there should be any question about having some drug testing there, or if they are in a security position. But, again, it has to be a test that is properly sound, that is a good, sound scientific test. It has to be an across-the-board kind of standard that is applied to all agencies, and there should be tied with it a proper rehabilitation and treatment program. I don't think anyone should be in a position of having to lose their employment as a result of drug testing. I think what we need is counseling, and rehabilitation, and possibly some change of position if there is a security interest involved.

Whatever process and procedure we put in place though, I think it is extremely important that we focus attention on it to be a balanced approach, a fair approach, with proper criteria and proper parameters, and it is for that reason that I welcome our witnesses today, and I would like to ask our witnesses a few questions.

First of all, how did you arrive at the cost of $3,400 to $13,000 per drug user for identifying a drug user? How did you arrive at that kind of an extensive cost?

Mr. Caradine. First, we used a combination of information obtained from the HHS certification report to the Congress as well as OMB statistics. What we did is, we determined the number of individuals subject to testing, the total costs, and, through mathematical equations, came up with costs.

Mr. Gilman. Tell me what are some of the components of arriving at a cost of, say, $13,000.

Mr. Caradine. It would be the total costs associated with the program. In terms of determining the number of potential hits, we used the information that showed the percentage of the work force that would be subject to the tests, and then applied the OMB guidance which indicated that as high as 5 percent of the individuals tested might be identified as users. We then applied the number of users to the total costs.

Mr. Gilman. What would it cost just for the individual abuser? Forget the overall program costs. What would it cost to identify one individual? Don't apply the overall program costs to it, but what are the actual costs for the individual?

Mr. **Caradine**. The actual costs for the individual would be the direct testing costs which, on the basis of the OMB guidance, were somewhere in the neighborhood of $50 or maybe $100.

Mr. **Gilman**. I'm sorry, I can't hear that.

Mr. **Caradine**. The direct testing costs, the costs of the collection and the analysis of the sample, on the basis of OMB's estimates, would be something in the neighborhood of $50. Then there would be indirect costs in terms of program administration which are not specified by OMB or by the agency plans in terms of education, initial counseling by the counselors, by the supervisor, and so forth.

Mr. **Gilman**. So the direct costs to the individual would not exceed $100.

Mr. **Caradine**. Perhaps not.

Mr. **Gilman**. If you don't attribute the entire program costs to that individual.

Mr. **Caradine**. On the basis of the data that we have, that is in the neighborhood.

Mr. **Gilman**. What are the opportunities for Federal employees who test positive to receive counseling and rehabilitation in all of the agencies? Is there some plan for doing that?

Mr. **Stevens**. Yes, certainly there is an emphasis on that in each of the plans. There is a provision for self-identification of people who have a drug problem in advance of the time when they are tested. They are somewhat restricted afterwards.

Mr. **Gilman**. If they do come forward voluntarily, are they assured of the protection of their employment?

Mr. **Stevens**. Yes, there are a number of provisions in there, and the differential for people who come forward before they have been designated for testing—if they come forward after they have been designated or as a result of a confirmed test, it's a good deal more restrictive.

Mr. **Gilman**. How does that vary? Let's assume he's a non-volunteer now and he's showed up in the testing. How does the manner in which the agency treats that employee differ from the person who voluntarily comes forward?

Mr. **Stevens**. I believe the provisions for people who are identified for the testing program are a good deal more, should I say, skeptical and provide for periodic follow-up testing, there's a good deal more of what I would call the fist as opposed to the velvet glove in dealing with it, which is quite appropriate, I believe.

Mr. **Gilman**. Do any of the agencies dismiss, or will they be dismissing, for a drug abuser who has not come forward voluntarily and shows up by way of the testing?

Mr. **Stevens**. The Marshals' plan will do that, yes, on a first-time test.

Mr. **Gilman**. Which plan?

Mr. **Stevens**. The United States Marshals Service in the Department of Justice.

Mr. **Gilman**. Any other agency?

Mr. **Stevens**. Not that is so specified, but one of the points we made is that there are no criteria for selecting among the great range of disciplinary actions that are available, including dismissal, in the plans.

Mr. **Gilman**. Shouldn't there be a Government-wide program that would provide for proper rehabilitation and treatment and take care of the dismissal problems? What are your recommendations?

Mr. **Stevens**. I think there is such a plan. Mrs. Horner's statement deals at some length with OPM's efforts to train people throughout the Government in the need for employee assistance plans and some progress that has been made in awareness there.

The focus of these efforts is agency by agency. I don't believe OPM aspires to take over dealing with individual employee problems, nor do I believe they should.

Mr. **Gilman**. I'm not suggesting that, but it would seem to me that if we're getting into a Government-wide program of this nature, that there should be some standard regulations to protect the employee throughout the entire Federal Government. Do you agree to that?

Mr. **Stevens**. Yes, we do, and one of the problems we pointed out with the plans is that there is only a listing of the disciplinary actions, for instance, that can be applied on a first time, positive, confirmed drug test ranging all the way from a letter of reprimand to dismissal. There are no criteria for helping an agency determine which of those disciplinary actions is the most appropriate under certain conditions.

Mr. **Gilman**. Who should be developing those criteria? Should that be OPM?

Mr. **Stevens**. I believe that would be appropriate to take the leadership on that, yes.

Mr. **Gilman**. Have you discussed that at all with OPM?

Mr. **Stevens**. No, we have not.

Mr. **Gilman**. I note that one of the witnesses who will be testifying a little later on states if there is some follow-up testing and it reveals drug use, that employee would be subject to dismissal. Would that apply in most of the agencies?

Mr. **Stevens**. Second time confirmed tests?

Mr. **Gilman**. Yes.

Mr. **Stevens**. Yes, it would.

Mr. **Gilman**. Do you think there should be some appropriate procedure to allow for counseling and rehabilitation even on a second, follow-up test?

Mr. **Stevens**. I think that would probably depend on the circumstances, and there is a good deal of variation allowed to agencies in the disciplinary actions available, some of which do involve counseling and mandatory rehabilitation requirements.

If an employee simply refuses and still reveals evidence of drug abuse, I think there is a point at which it becomes—the only reasonable conclusion is that this employee should be dismissed. But, again, that ignores the problem under the Civil Service Reform Act of demonstrating some kind of impairment of job performance, and that is not dealt with.

Mr. **Gilman**. Is it appropriate then for OPM to develop a set of regulations of how to deal with this problem across the board throughout all of the Federal agencies? Does OPM have the authority, and would they have the responsibility, to develop standards for the agencies to utilize in addressing a violation that is found by way of drug testing?

Mr. **Stevens**. I believe so. I would feel better if you asked Mrs. Horner that question directly, but I am aware that OPM does take a good deal of leadership in guiding agencies in those areas, in instructing them. The extent to which this should be a regulatory function, I really do not have an opinion on that.

Mr. **Gilman**. But at this point, there is no regulation that you are aware of nor any guidance to any of the agencies. Is that correct?

Mr. **Stevens**. I think there is guidance. OPM provides it. They are carrying out some training. They have people devoted full time to questions of employee assistance. It is not limited just to drug abuse.

Mr. **Gilman**. Are there any written guidelines to the agencies from OPM on how to handle the drug abuser that has shown up by way of a drug test?

Mr. **Stevens**. Not that I know of, but that doesn't necessarily mean they don't exist.

Mr. **Gilman**. Have the agencies themselves developed printed guidelines?

Mr. **Stevens**. I would suspect that each employee assistance plan does have——

Mr. **Gilman**. No suspecting, please. Did you examine any?

Mr. **Stevens**. They are not spelled out in any detail in the agency drug testing plans that were submitted to the Congress.

Mr. **Gilman**. I'm sorry, would you repeat that?

Mr. **Stevens**. They are not spelled out in any detail in the agency drug testing plans that were submitted to the Congress, but that doesn't mean they don't exist at the agencies.

Mr. **Gilman**. As far as you know, you haven't seen any.

Mr. **Stevens**. We have not seen them, no, sir, but we didn't go down to the individual agencies to look for their existence.

Mr. **Gilman**. You didn't make such a request of any of the agencies?

Mr. **Stevens**. No, sir.

Mr. **Gilman**. Some of the employee representatives tell us that their people should not turn in—they advised their people not to turn themselves in because of the possible dismissal. Is that a real threat—dismissal—if they do turn themselves in voluntarily?

Mr. **Beall**. In the agency plans that we reviewed, there is a variation in terms of the wording in the plans concerning the voluntary referral in which somebody identifies themselves. This was not a particular area that we did a specific analysis of, but we did find that the wording was different enough to the extent that it could be a fear in some agencies where the plans do not specifically state that they will not risk that particular disciplinary action.

Mr. **Gilman**. Is it a real threat? Could they be dismissed for voluntarily turning themselves in as a drug abuser?

Mr. **Stevens**. There is a fairly specific provision in the plans that if an individual, completely unthreatened by a drug test, or unrevealed as a user by the drug test, turns himself in voluntarily for an employee assistance program, that he is immune at that point from dismissal.

Mr. **Gilman**. What provision are you referring to, Mr. Stevens? Is there something written in the regulations?

Mr. **Stevens**. There is a section in each of the plans having to do with voluntary testing.

Mr. **Gilman**. But yet you are not aware of all of the plans. You have examined just a few of the agency plans?

Mr. **Stevens**. We have examined all of the ones from the civilian Cabinet level departments, and those provisions, I believe, are part of a model plan that the Department of Health and Human Services gave to the agencies, and my memory of the ones I looked at is that that part is fairly identical from plan to plan and it does follow the model one.

Mr. **Gilman**. You have examined all of the Cabinet level department plans?

Mr. **Stevens**. Pardon me?

Mr. **Gilman**. You say you have examined all of the plans submitted by Cabinet level departments?

Mr. **Stevens**. Yes, sir.

Mr. **Gilman**. And that includes each department that is at Cabinet level.

Mr. **Stevens**. Just the civilian ones; we excepted the military departments.

Mr. **Gilman**. And all of them have a full plan for drug testing?

Mr. **Stevens**. Excuse me?

Mr. **Gilman**. All of them have evolved a full plan for drug testing?

Mr. **Stevens**. Yes, sir.

Mr. **Gilman**. And do they spell out in those plans a procedure for dismissal?

Mr. **Stevens**. Well, yes, that is one of the actions that is contemplated in the range of disciplinary actions that are spelled out.

You mean dismissal in the case of voluntary?

Mr. **Gilman**. Well, both voluntary and non-voluntary.

Mr. **Beall**. I refer here to the model plan that the agencies followed very closely in developing their plans.

Mr. **Gilman**. Who evolved the model plan?

Mr. **Beall**. This was developed by the Interagency Coordinating Group under the aegis of the National Drug Policy Board. I don't know the specific members of that group.

Mr. **Gilman**. They all adopted that model plan?

Mr. **Beall**. The wording of each individual agency plan follows this model plan very closely in most respects. However, it should be pointed out that the model plan leaves sections open where each agency is supposed to, if you will, fill in the blanks for aspects of the plan that are unique to their situation.

Mr. **Gilman**. Does the model plan spell out a procedure for disciplinary actions?

Mr. **Stevens**. Yes, sir. It gives a choice to the agency head, and the agency head can take one of two actions. This is instruction to the agency head now. It says: "If you do not wish to create an absolute bar to discipline for individuals who voluntarily come forward, insert the following language:" and then there are 15 lines or so of instructions as to the way in which discipline would be required.

But there is another option which is, "If you wish to create an absolute bar to discipline for individuals who voluntarily come forward, insert the following language:" and then there is language that is in some of the plans that would prevent the agency from disciplining a person who came forward voluntarily.

Mr. GILMAN. So if they were to adopt the discretionary sections in the model plan, then we have a variation from agency to agency, do we not?

Mr. STEVENS. Yes, sir, and that is contemplated in the model plan.

Mr. GILMAN. There is no uniformity then in how we are handling this regulation.

Mr. STEVENS. No.

Mr. GILMAN. Do we have a copy of the model plan?

Mr. SIKORSKI. The 4,500 pages are right over there. The model plan is in there, which is basically boilerplate that is picked up by the various agencies, except for the "fill in the blank" provisions.

Mr. GILMAN. Have you, in your GAO study, shown the variations from agency to agency? Have you pinpointed those for us?

Mr. STEVENS. Yes.

Are you asking whether we have done that?

Mr. GILMAN. Yes.

Mr. STEVENS. Yes. We have that data. We haven't aggregated it for the testimony.

Mr. GILMAN. Can you put that together in a chart for us to show how, for example, volunteers coming forward, are they entitled to rehabilitation, dismissal, et cetera, et cetera?

Mr. STEVENS. Yes, sir.

Mr. GILMAN. Can you do a comparative chart for us?

Mr. STEVENS. We certainly can.

Mr. GILMAN. Mr. Chairman, I would like to request that such a chart be made available to the committee and inserted in the record at this point.

Mr. SIKORSKI. Without objection, it is so ordered, and we thank the GAO.

[The information follows:]

Disciplinary Actions

All plans require that some disciplinary action be initiated against an employee after a first finding of illegal drug use or for refusal to be tested. The plans list a set of possible disciplinary actions, ranging from a written reprimand to dismissal, that may be taken. The following chart shows the disciplinary actions mentioned in the plans.

Range of Disciplinary Actions

Plan	Written reprimand	Enforced leave	Suspension	Demotion	Removal
AGRICULTURE	X	X	X	X	X
COMMERCE	X	X	X		X
EDUCATION	X	X	X		X
ENERGY	X		X		X
HHS	X	X	X	X	X
HUD	X	X	X		X
INTERIOR	X		X	X	X
JUSTICE					
Umbrella Plan	X	X	X		X
Offices/Boards	X	X	X		X
Marshals Service					X
LABOR	X	X	X		X
STATE	X	X	X		X
TREASURY					
Comptroller's Off.	X	X	X		X
Departmental Off.	X		X		X
Engraving/Printing	X	X	X		X
Law Enforcement TC	X	X	X		X
Fin. Mgmt. Ser.	X	X	X		X
Internal Rev. Ser.	X	X	X		X
Public Debt	X	X	X		X
U.S. Mint	X	X	X		X
Savings Bond Div.	X	X	X		X

However, under Executive Order 12564, disciplinary action is not required for an employee who voluntarily admits to drug use, completes counseling or an employee assistance program, and thereafter refrains from drug use. All plans, with the exception of the U.S. Marshals Service, provide for voluntary referrals but differ on the matter of disciplining voluntary referrals. Some plans provide an absolute bar to disciplining voluntary referrals who meet the treatment and abstinence conditions, while other plans expressly retain the option of disciplining such employees on a case-by-case basis. The following shows each agency plan's position on disciplining voluntary referrals.

Discipline not barred
for voluntary referral

- ENERGY
- INTERIOR
- JUSTICE
  - Umbrella Plan
- LABOR
- TREASURY
  - Departmental Offices
  - Law Enforcement Training Center
  - Financial Management Services
  - U.S. Mint
  - Savings Bond Division

Discipline barred for
voluntary referral

- AGRICULTURE
- COMMERCE
- EDUCATION
- HHS
- HUD
- JUSTICE
  - Offices/Boards/Divisions
- STATE
- TREASURY
  - Comptroller's Office
  - Engraving/Printing
  - Internal Revenue Service
  - Public Debt

Under those plans that do not bar a disciplinary action, a voluntary referral could be subject to dismissal. The U.S. Marshals Service plan does not provide for voluntary referrals and also specifies that action to remove an employee will be taken after a first finding of illegal drug use.

All plans require that the agency initiate action to remove an employee for refusing to obtain treatment through an Employee Assistance Program or after a second finding of illegal drug use. This would include voluntary referrals, since either circumstance would violate the conditions that preclude disciplinary action for voluntary referrals.

All plans provide for employee referral to an employee assistance program on a finding of illegal drug use. Voluntary referrals must complete a counseling/treatment program as a condition for deferring the disciplinary action requirement. Voluntary referrals who are administratively channeled through the employee assistance program will be subject to follow-up testing after rehabilitation.

Mr. GILMAN. Thank you. No further questions, Mr. Chairman.

Mr. SIKORSKI. I thank the gentleman from New York.

We have no further questions, and we thank you for your continuing assistance. The subcommittees of the Post Office and Civil Service Committee have benefited greatly over a year now from the GAO assistance in this area, and we look forward to continuing that relationship. Thank you for your efforts.

Mr. STEVENS. Thank you, Mr. Chairman.

Mr. SIKORSKI. Mr. Stevens, Mr. Beall, Mr. Caradine, thank you for your efforts.

Our next witness is the Director of the Office of Personnel Management, Constance Horner. The Office of Personnel Management is responsible for the implementation of employee assistance programs. We thank her for focusing her testimony on this issue today as well as responding, as best can be done, to the concerns of the subcommittees, as raised in part by the GAO testimony.

The Subcommittee on Civil Service and the Subcommittee on Human Resources wish to thank Director Horner for taking time out of her very busy schedule to appear before the subcommittees on this very important issue, and we welcome you here this morning.

Your entire testimony, as written, or as you desire it to be written, will be inserted in the record, and you can summarize for us and hit the high points, as you wish.

STATEMENT OF CONSTANCE HORNER, DIRECTOR, U.S. OFFICE OF PERSONNEL MANAGEMENT, ACCOMPANIED BY MARK BARNES, ASSOCIATE DIRECTOR FOR ADMINISTRATION; AND CARROL KINSEY, DEPUTY ASSISTANT GENERAL COUNSEL

Mrs. HORNER. Thank you, Mr. Chairman. I will do that.

The President's program consists of five major objectives. I'd like to outline them and discuss them very briefly in summary.

The first is the establishment of a general policy and mission statement by each agency head for eliminating drug use in the work place. The second is the use of employee assistance programs, as you noted, Mr. Chairman, and rehabilitative services to assist drug users in becoming drug free. The third is supervisory training to assist in identifying and addressing illegal drug use by employees. The fourth is intensive drug awareness campaigns to educate the work force about the deleterious consequences of illegal drug use; and, finally, identification of illegal drug users through various means, including urinalysis screening.

OPM's role under the Executive order is clearly defined. We are required to issue Government-wide guidance to the agencies on the implementation of the Executive order; continue to pursue appropriate health insurance coverage for drug abuse counseling and treatment; develop a model employee assistance program for Federal agencies and assist agencies in putting assistance programs in place; consult with HHS to develop and improve programs for Federal supervisors and managers on illegal drug use; and work with HHS on Government-wide drug awareness campaigns for the Federal work force.

As my prepared statement details, OPM has completed or is working on each of these tasks. I would like briefly to discuss OPM's efforts in the employee assistance area and to make some observations on the drug testing program.

OPM is allocating significant resources to what I consider to be our primary mission in support of a drug-free Federal work place: the improvement of employee assistance programs that aid employees in identifying substance abuse problems and that provide short-term counseling and referral to appropriate treatment and rehabilitation services.

The mission to help employees with drug abuse problems was emphasized by the President in his Executive Order. It requires that employees who are identified as users of illegal drugs be given an opportunity to stop their drug use, to overcome their problems through enrollment in employee assistance programs. The Anti-Drug Abuse Act of 1986 requires that Federal agencies develop and maintain programs for assisting employees with substance abuse problems through counseling, treatment, and rehabilitation, or through referrals to programs designed to achieve these goals.

Assisting Federal agencies in improving the visibility and effectiveness of their EAP's is one of OPM's highest policy priorities. Among the major actions we have taken and efforts concurrently under way, are as follows:

We have developed a model employee assistance program containing guidelines for staffing, operating, and evaluating Federal sector EAP's. This model was included in OPM's November 1986 policy guidelines on a drug-free Federal work place.

In October 1987, I sent a memo to heads of Federal agencies urging that they make employee assistance programs responsive to the need to create a drug-free work place and pointing out that, when used properly, EAP's have an impressive track record in helping employees overcome substance abuse problems and return to being productive members of the work force.

In January 1988, OPM issued a directory of treatment resources in the Washington, D.C., area for EAP counselors' use and for referring employees with substance abuse problems. Treatment resources directories are being developed by OPM's regional offices for other major cities, and we are working on, or may have completed by now, a directory which helps EAP counselors understand what insurance coverage is available for Federal employees who are referred to them.

In April of this year, we sponsored a conference entitled "Beyond Drug Testing: The Mission To Help" for top headquarters personnel management and EAP officials. Our regional offices are holding similar conferences in other parts of the country.

We are currently developing a brochure for Federal employees which will provide basic information on what services EAP's provide and when they can be used. The brochure will be designed in an easy-to-read question and answer format. In fact, the visibility of the drug issue has heightened the visibility of EAP's in the Federal Government and, I think, been very good for agency management in realizing the important services they perform.

To strengthen the Government-wide effort to improve EAP's, we are working with the Office of Workplace Initiatives of the National Institute of Drug Abuse to make additional training resources, counseling tools, and other information available to Federal EAP practitioners.

We conducted a series of training courses in Washington and regional cities entitled "A Drug-Free Federal Workplace" during fiscal year 1987. The courses are designed to help Federal supervisors and managers identify employees with substance abuse problems and properly refer them to EAP's.

This fiscal year, we are conducting a nationwide review of 550 installation level EAP's in Federal agencies. This assessment should provide a great deal of useful information to OPM and agencies on the scope and effectiveness of EAP services provided to Federal employees.

In addition, we are developing a model self-evaluation tool for use by agency EAP administrators in determining the effectiveness of their individual programs.

Finally, I would like to share with the committee some key information contained in our recently completed annual report to Congress on drug and alcohol abuse programs for Federal employees. If the committee will allow, I would like to submit a copy of this report for the record.[1]

The report reflects the increased attention and resources agencies are devoting to these programs. For example, during fiscal year 1987 as compared to fiscal year 1986, employee use of EAP's increased by 3 percent; employees counseled for drug abuse rose 15 percent; there was an increase in the number of employees helped by EAP's contrasted to those who were not helped; and expenditures increased by 13 percent to almost $20 million.

In addition, agencies reported that over 150,000 supervisors and managers were trained in how to deal with various substance abuse problems. More complete program statistics and an overview of the professional qualifications of EAP practitioners are contained in my formal statement.

Under the Executive Order, OPM's jurisdiction has been limited to the functions I've just mentioned. I realize, however, that the committee is also interested in the implementation of drug testing in the Federal Government generally.

Last May, the Department of Health and Human Services delivered to the Congress its certification of 42 Federal agency Tier I drug-free workplace plans, commencing the second phase of implementation of the Federal drug testing program. Last summer, other members of the administration and I participated in a series of discussions with Members of both the House and the Senate to arrive at a compromise which would allow the implementation of the President's Executive Order. A compromise was reached and is reflected in the supplemental appropriations bill enacted in July of 1987.

The law requires HHS to certify that various executive branch agencies comply with criteria set forth in the law, that positions designated for drug testing are properly justified, that procedural uniformity is achieved, that HHS publish its scientific and technical guidelines on drug testing in the Federal Register, and that OMB provide cost estimates on urinalysis screening.

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[1] The report referred to was retained in the official hearing file.

For the Tier I agencies, each of these requirements was met on May 3 of this year, after Secretary Bowen had made his certifications and after the scientific and technical guidelines had been published in final form in the Federal Register on April 11.

The Tier I agencies are ready to proceed to implement drug testing but need to complete notice requirements, labor negotiations, and specimen collection arrangements before actual testing begins.

The Tier II agencies, as defined under the Act, are already conducting tests or will soon begin testing and have generated most of the current legal challenges to the testing program. The Tier III agencies, over 120 smaller Federal agencies not falling into the above two tiers, are preparing their drug testing plans for certification. Unlike Tier I agencies, the Tier III agencies need not be certified in tandem but may proceed separately to implement testing programs upon HHS approval.

OPM was one of the 42 Federal agency plans certified on May 3, 1988. We will be contracting out for our urinalysis screening and laboratory services under the Department of Transportation's screening contract, which I consider to be an extremely reliable and well-managed program.

We have issued our 60-day notice, and we will shortly send out our 30-day notice, to those in testing-designated positions. Almost all of our positions designated for testing are in the Office of Federal Investigations or in the chain of command for sensitive material generated from that office. The number of positions in OPM's pool is less than 700 out of a work force of nearly 6,000.

We have conducted our impact and implementation bargaining with the appropriate labor organizations who represent our employees, and I am pleased to report that we have reached agreement with the major union at our central office, Local 32 of AFGE.

Finally, the disruption and cost impact upon the work force in terms of the amount of random testing which will ultimately be conducted in the Government appears to be far less than some previously thought. There are approximately 1,975,000 civilians in the Tier I work force. Of those employees, only about 17 percent are in testing-designated positions and subject to random testing. Of this pool, it is estimated that between 100,000 and 120,000 employees will be tested in the first year of the program, comprising only about 5 percent of the total number of Federal employees. These employees engage in activities that affect national security, public safety, law enforcement, transportation, and other high risk areas.

I believe that the current program protects employee privacy and confidentiality, meets the mission to protect the public and non-drug-using Federal employees, and helps those who are drug users to become drug free. Mr. Mark Barnes, Associate Director for Administration and special counsel for drug abuse matters, and Carrol Kinsey, Deputy Assistant General Counsel, and I will be very happy to answer any questions you or other members of the committee have.

[The statement of Mrs. Horner follows:]

STATEMENT OF HON. CONSTANCE HORNER, DIRECTOR, U.S. OFFICE OF PERSONNEL MANAGEMENT

Chairman Sikorski, Chairwoman Schroeder, members of the committee thank you for inviting me to testify today on President Reagan's drug-free Federal work place initiative, as embodied in Executive Order 12564, and as enacted in section 503 of the Supplemental Appropriations Act of 1987.

When President Reagan signed Executive Order 12564 on September 15, 1986, no one could dispute the enormous cost and toll that illegal drug use has taken upon our society, including the work place.

Studies, such as one conducted by the Research Triangle Institute, have estimated that the cost of the U.S. economy from lost productivity caused by drug use was in excess of $30 billion in 1983 alone.

In contrast to their non-drug using counterparts in the work place, drug users are three to four times more likely to be injured in on the job accidents; are absent from work two to three times as often; report 50% more often to missing one or more days of work a month because of illiness or injury; are more likely to steal company and coworker property to support drug habits; and are more likely to experience strained relations with other employees and those around them.

We must not veer from our course of aggressive measures to end illegal drug usage in our country, particularly in the work place. The President's Executive order set forth the framework for doing just that for the Federal Government.

Contrary to the notoriety and attention given to drug testing, the primary focus of drug-free Federal work place initiative is not detection of illegal drug use. The President's program consists of five major objectives.

1. The establishment of a general policy and mission statement by each agency head for eliminating drug usage in the work place.
2. Use of employee assistance programs, and rehabilitative services to assist drug users in becoming drug free.
3. Supervisory training to assist in identifying and addressing illegal drug use by employees.
4. Intensive drug awareness campaigns to educate the workforce about the deleterious consequences of illegal drug use, and
5. Identification of illegal drug users through various means, including urinalysis screening.

OPM's role under the Executive order is clearly defined. We are required to: Issue Government-wide guidance to the agencies on the implementation of the executive order; continue to pursue appropriate health insurance coverage for drug abuse counseling and treatment; develop a model employee assistance program for Federal agencies and assist agencies in putting assistance programs in place; consult with HHS to develop and improve programs for Federal supervisors and managers on illegal drug use; and to work with HHS on Government-wide drug awareness campaigns for the Federal work force.

I am pleased to report that OPM has completed or is working on each of those tasks, and in particular, is placing a great deal of emphasis on the "helping hand" aspects of the president's program. We are working very closely with HHS on improving employee assistance programs and access to community treatment resources.

In particular, in November, 1986, and in March, 1987, OPM issued FPM letters 792-16 and 792-17. These are Government-wide, non-binding guidance to assist agencies in the implementation of Executive Order 12564. We also attached a description of a model employee assistance program plan to FPM letter 792-16.

Secondly, OPM's Retirement and Insurance Group, which administers the Federal Employee Health Benefits Program, has continued to pursue the improvement of plan benefits for substance abuse treatment. As you may know, during the 1987 health benefits open season all health plan contractors, at OPM's insistence, were required for the first time to provide benefits for substance abuse.

The nature and extent of such coverage varies from plan to plan. To assist agencies in determining what benefits are available, OPM has published "A Guide to Substance Abuse Treatment Benefits Under the FEHB for 1988."

This guide will also help counselors make appropriate referrals of employees to treatment and rehabilitation service providers.

Third, OPM's Office of Public Affairs and OPM's Office of General Counsel have been working with HHS, its various subdivisions, and the National Drug Policy Board working groups, in formulating and developing drug awareness campaigns to reach both users and non-users in the Federal workforce. HHS is developing a series of video materials that will be very helpful and appropriate for use in the Federal work place.

Because of the interdisciplinary nature of the information that is being offered, OPM often works in partnership with the other lead Federal agencies with responsibility for this program in developing these public awareness materials, which include television and radio public service announcements, distribution of posters which were developed in conjunction with and supported by the Federal employee unions, drug awareness programs featuring guest speakers, and publication of discussions and articles.

Fourth, the training and investigations group of OPM is offering a supervisory and managerial training course to address those aspects of drug abuse and prevention that arise in the workplace. Participants will receive instructions on recognizing the symptoms of drug abuse and will be provided information on how to refer employees to employee assistance programs. This Government-wide training is complementary to training that individual agencies offer through their own curricula.

Additionally, OPM is a member of the Inter-Agency Coordinating Group, a committee consisting of one representative from OPM, one representative from the Department of Justice, and two representatives, one of whom chairs the committee, from the Department of Health and Human Services. The Inter-Agency Coordinating Group was formed primarily to implement the executive order and the directives Congress set forth in the Supplemental Appropriations Act for drug testing.

In that regard, two major training conferences for implementing the public law have been held by the ICG. One conference was held for major Cabinet level agencies in September, 1987, and the second conference was held in May of this year for the smaller agencies. OPM co-sponsored both training conferences. In addition to the primary topic of urinalysis, all other major components of the drug-free Federal work place program were covered: EAPs; supervisory training; employee education programs; and the mission and policy statement for the program.

Finally, OPM is allocating significant resources to what I consider to be its primary mission in this matter: The improvement of employee assistance programs that aid employees in problem identification and that provide short-term drug counseling, and referral to appropriate treatment and rehabilitation services.

The mission to help employees with drug abuse problems was emphasized by the President in his Executive Order 12564 on a drug-free Federal workplace. In 1986 the Congress also passed and the President signed into law the Anti-Drug Abuse Act of 1986.

The President's Executive order requires that employees who are identified as users of illegal drugs be given an opportunity to overcome their problems through enrollment in employee assistance programs. The Anti-Drug Abuse Act requires that Federal agencies develop and maintain programs for assisting employees with substance abuse problems through counseling, treatment and rehabilitation, or through referrals to programs designed to achieve these goals.

A "model" employee assistance program which contains guidelines for staffing, operating and evaluating EAPs was developed by OPM and included in its November, 1986, policy guidelines. In October, 1987, I sent a memorandum to heads of Federal agencies urging that they make employee assistance programs responsive to the need to create a drug-free Federal workplace. Employee assistance programs, when utilized properly, have an impressive track record in helping employees overcome substance abuse problems and return to being productive members of the workforce.

Assisting Federal agencies in improving the visibility and effectiveness of their employee assistance programs is one of OPM's highest policy priorities. OPM is continuing to offer initiatives to improve the visibility and effectiveness of Federal sector EAPs. Before discussing them, I would like to share with the committee some key information contained in OPM's recently completed annual report to Congress on drug and alcohol abuse assistance programs for Federal employees. The report provides an overall review of the level of utilization, cost and operation of Federal sector EAPs, during fiscal year 1987, with a particular focus on programs designed to help employees overcome drug and alcohol abuse problems.

A copy of the report is being submitted for the record, but the highlights of the report are as follows:

SIGNIFICANT FINDINGS OF THE REPORT

The total number of referrals (both self and management initiated) to Federal EAPs in fiscal year 1987 increased by 3 percent compared to fiscal year 1986.

In fiscal year 1987, 4242 employees were counseled for drug abuse—a 15 percent increase over fiscal year 1986. Employees covered under this category include those with problems with all drugs, illegal and legal, except alcohol.

In FY 87 the ratio of employees "helped" to those "not helped" (3½ to 1) was slightly higher than in FY 86 (3 to 1).

Of the employees who used EAPs in FY 87, 56 percent were self-referrals and 44 percent were management-initiated referrals. Management-initiated referrals usually occur as a result of some deficiency in the employee's job performance or conduct. These percentages are identical to the figures for FY 86.

Supervisory training

In FY 87 Federal agencies reported training approximately 153,000 supervisors and managers on how to deal with employees with known or suspected substance abuse problems. This training featured a strong emphasis on making appropriate referrals to agency EAPs. In addition, OPM conducted the course, "A drug-free workplace" on 21 occasions throughout the country. It is designed for Federal supervisors and managers in order to help them identify and refer employees with substance abuse problems to EAPs.

Qualification of EAP professionals

The personnel administering Federal EAPs are competent and capable professionals providing services to Federal civilian employees. Reports from agencies indicate that approximately 79 percent of Federal agency EAP administrators and counselors have advanced degrees in counseling, employee health or a related field.

The remaining EAP practitioners have either medical backgrounds or have received-on-the job training in counseling supplemented by courses, seminars and other training related to substance abuse counseling. OPM offers a course entitled "Administering the Employee Counseling Program." This course provides EAP administrators with the latest information and techniques for effectively operating and evaluating their agency EAPs.

Operating costs and services

The total operating cost for Federal civilian EAPs for FY 87 was $19,603,815, a 13 percent increase over FY 86. These costs cover EAP counseling and referral services to assist employees seeking to overcome drug, alcohol and other personal and/or emotional problems. Employees bear the expense of actual treatment.

OPM EAP IMPROVEMENT EFFORTS

As I mentioned earlier, OPM has undertaken several initiatives to increase the visibility and effectiveness of Federal EAPs, such as the model EAP and my memorandum to heads of agencies. Other OPM key efforts are the following:

In January 1988 OPM issued a directory of treatment resources for EAP counselors' use in referring employees with substance abuse problems in the Washington, D.C. area. Directories are being developed for other major cities.

In April 1988 OPM sponsored a conference entitled "Beyond Drug Testing: The Mission to Help" for top headquarters personnel and EAP officials. OPM's regional offices have held similar conferences.

This year OPM is conducting a nationwide review of 550 agency installation EAPs. The final report will show EAP utilization, services provided and associated costs.

OPM is developing a self-evaluation guide to assist EAP administrators in evaluating their programs.

OPM is developing a question-and-answer brochure for all Federal employees on the Federal EAP concept.

To further strengthen EAPs, OPM is collaborating with the Office of Workplace Initiatives of the National Institute of Drug Abuse [NIDA] to make some additional resources and programs available to agency EAP counselors and administrators. These initiatives focus on:

Developing guidelines for Federal EAPs to be published in the fall of 1988. These guidelines will help ensure that agencies are including all appropriate elements in their employee assistance programs.

Intensifying efforts to inform EAP administrators and professionals of current training courses, services and resources available in the areas of supervisory education, training, professional development, establishment of EAP credentials, and contracting options for counseling and referral services.

Developing a drug education update course for EAP counselors and administrators. This course will update EAP practitioners' skills in drug abuse counseling and supervisory training.

These initiatives, together with follow-up on the results of the evaluation study we are doing this year, comprise OPM's basic agenda for improving EAP effectiveness.

The vast bulk of OPM's work has been spent on the improvement and enhancement of employee assistance programs.

Under the executive order, OPM's jurisdiction has been limited to the functions I have just mentioned. I realize, however, that the committee also has a great deal of interest in particular in the implementation of drug testing in the Federal Government generally.

On May 3, 1988, the Department of Health and Human Services delivered to the Congress it's certification of 42 Federal agency "Tier I" drug-free work place plans, commencing the second phase of implementation of the Federal Drug-free work place program. Last summer other members of the administration and I participated in a series of discussions with members of both the House and the Senate to arrive at a compromise which would allow the implementation of the President's Executive order. A compromise was reached and is reflected in Public Law 100-71, which was enacted in July of 1987.

The law requires HHS to certify that various executive branch agencies comply with criteria set forth in the law, that positions designated for drug testing are properly justified, that procedural uniformity is achieved, that HHS publish its scientific and technical guidelines on drug testing in the Federal Register, and that OMB provide cost estimates on the drug-free work place program.

For the tier I agencies, each of these requirements was met on May 3, 1988, after Secretary Bowen had made his certifications, and after the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" were published in final form in the Federal Register on April 11, 1988.

The tier I agencies are ready to proceed to implement drug testing but need to complete notice requirements, labor negotiations, and specimen collection arrangements before actual testing begins.

The tier II agencies, as defined under the act, are already conducting tests or will soon begin testing and have generated most of the current legal challenges to the testing program. The tier III agencies, over 120 smaller Federal agencies not falling into the above two tiers, are preparing their drug-free work place plans for certification. Unlike tier I agencies, the tier III agencies need not be certified in tandem, but may proceed separately to implement testing programs upon HHS certification.

OPM was one of the 42 Federal agency plans certified on May 3, 1988. We will be contracting out for our urinalysis screening and laboratory services under the Department of Transportation's screening contract, which I consider to be an extremely reliable and well managed program.

We have issued our 60 day notice, and will shortly send out our 30 day specific notice to those in testing designated positions. Almost all of our positions designated for testing [TDPS] are in the Office of Federal Investigations or in the chain of command for sensitive material generated from that office. The number of positions in OPM's TDP pool is less than 700 out of a work force of nearly 6000.

We recently conducted our impact and implementation bargaining with the appropriate labor organizations who represent OPM employees. I am pleased to report that we have reached a fine agreement with the major union operating at our central office, local 32 of the American Federation of Government Employees.

This agreement is especially promising because it incorportes a concept of a joint management/labor advisory committee charged with finding effective strategies for dealing with illegal drug usage in the work place. I strongly believe in partnerships between management and labor in attacking this problem, because we must have the support not only of our supervisory personnel, but also of non-users of illegal drugs in the general work force.

In assessing the success to date of the drug-free Federal work place program, I would say that several elements of the program are proceeding at a statisfying and encouraging pace, especially employee assistance program improvements, supervisory training, and general employee education.

With regard to drug testing, it is too early to forecast the ultimate impact of this program since administrative, legislative, and legal concerns have had to be addressed for over a period of nearly a year and a half before the program could begin full implementation.

There is reason to believe that the impact of drug testing on the civilian workforce will be to reduce drug usage as it did in the military. Since implementing random testing, the military has experienced a 67% across the board decrease in drug use, service-wide.

The private sector has achieved comparable results. Southern Pacific has determined that the number of rail accidents in which "human factors" played a part has dropped more than 60% and lost time injuries have declined by 24% PG&E reported a 25% reduction in accidents and a 40% decrease in serious injuries. In addition, Georgia Power found that its accident rate dropped from 5.4 for every 200,000 man hours in 1981 to .49 in 1986.

Finally, the disruption and cost impact upon the workforce, in terms of the amount of random testing which will ultimately be conducted in the government, appears to be far less than some previously thought. There are approximately 1,975,000 civilians in the tier I workforce. Of those employees, only about 17% are in testing designated positions and subject to random testing. These employees engage in activities that affect national security, public safety, law enforcement, transportation and other high risk areas.

I believe that the current program protects employee privacy and confidentiality, meets the mission to protect the public and non-drug using Federal employees, and helps those who are drug users to become drug free.

If I can answer questions for the committee at this point, I would be pleased to do so.

Mr. SIKORSKI. Again, the subcommittees thank you for your testimony.

The gentleman from New York is recognized.

Mr. GILMAN. I thank the chairman, and I want to welcome our director before us. It is always a pleasure to have you appear before our committee.

It appears that we have a number of varied programs throughout the agencies. Can you tell us what you are trying to do to bring them all together into one uniform program?

Mrs. HORNER. Yes, Congressman. We labored for a long time to ensure procedural uniformity Government-wide, and I believe we have ensured uniformity Government-wide, in the kinds of positions that an agency head designates for testing, specifically, positions having to do with national security, law enforcement, high trust and confidence, and there are several others.

I'd like to address the concerns that the committee has about uniformity. In fact, we do permit agency heads discretion in making the specific choices of which jobs to be tested or designated for testing, because although a job may have the same literal title, like clerk-typist, the variety of circumstance within the Federal Government is really quite extraordinary; 87 percent of our employees, for instance, work beyond the Beltway. Some may be clerk-typists for national security programs, and some not. There is a great variety of circumstance.

What we have attempted to do, and I think succeeded in doing, is identifying uniformity of criteria which allows varied application dependent upon varied circumstances.

Mr. GILMAN. Do you see a need for greater clarity in the standards and the criteria for who should be tested, in determining which employees should be tested? I note that there is a pretty wide range out there. We find that photographers, conveyance clerks, cooks, land law examiners are all being thrown into this wide net, and it doesn't seem to be appropriate that they be included in some of these areas. Have you tried to develop some criteria for limiting those people who are in the more sensitive positions that would require testing?

Mrs. HORNER. Congressman, everything we did was designed to reduce to the bare minimum necessary the number of Federal employees tested. If we were to try to be uniform, this is what we would have to do. For example, If there is a cook who is cooking for the Secretary of Defense and who perhaps is going to overhear top secret conversations, and who is required to have has his own background checked, that is different from being a cafeteria cook at OPM. If we were to try to be totally uniform, we would have to sweep on to the testing list cooks for whom it would be absurd to test. What we are trying to do is put the responsibility on the agency head to exercise appropriate discretion so we don't end up testing people it would be silly and intrusive and gratuitous to test. That is why we have left the discretion in the program, not to get more people tested but to make it possible to tailor the programs so as to have fewer people tested.

Mr. GILMAN. What sort of oversight do you have to make sure the agencies are trying to be more reasonable in applying the standards for testing?

Mrs. HORNER. There would be a conflict between giving the necessary discretion to an agency head and the idea that some other agency head is going to second-guess and declare something reasonable or unreasonable.

Mr. GILMAN. Do you undertake oversight? Do you get back into the agency and take a look at whom they are testing and say, "Hey, this is an abuse of your discretion," or, "You shouldn't be testing the gardeners, or the cooks, or the photographers, but should be concentrating on the more sensitive positions"?

Mrs. HORNER. Under the agreement we reached with the Congress prior to the passage of the Supplemental Appropriations Act, the plans are sent to HHS, which reviews, compiles, and certifies them and sends them to the Congress. I think that we do have standing oversight capabilities within the Government, both within the Congress and within the GAO, for instance, at the behest of the Congress.

I think that this issue should be treated as many issues are. We should presume that, barring complaint by an individual employee, barring complaint by an agency head, the oversight capacities already existing, are sufficient.

Mr. GILMAN. Does your agency undertake oversight? Do you go into the agency and review the classification of employees who are being tested?

Mrs. HORNER. We would do that only as part of our ongoing review of all agency personnel actions, which is periodic—in other words, not a systematic one dedicated specifically to this purpose, no.

Mr. GILMAN. So you don't have an ongoing oversight program for drug testing?

Mrs. HORNER. Congressman, I cannot, as OPM director, tell the Secretary of Defense that I think he is wrong when he thinks that a position is sensitive. He has the information, the responsibility, the accountability, to make that determination; the OPM director really doesn't, in my judgment.

Mr. GILMAN. Did your office establish criteria, send our model programs to all of the agencies?

Mrs. **Horner**. Yes, we did. We established our Guidelines for a Drug-Free Federal Workplace, which gets to drug testing, which gets to disciplinary actions.

Mr. **Gilman**. Mr. Chairman, do we have a copy of those guidelines?

Mr. **Sikorski**. We have a copy of them, and I'm sure the Director has a copy of them.

Mrs. **Horner**. We would be happy to make sure you have one.

Mr. **Gilman**. When did you send out our guidelines? How long ago?

Mrs. **Horner**. November of 1986.

Mr. **Gilman**. And since November of 1986, have you gone back to the agencies to see how these programs are working or whether there is something that should be ironed out?

Mrs. **Horner**. Congressman, because of interventions by the Congress and by the courts in some cases, the program is only getting under way now, even though it was established back in 1986.

Mr. **Sikorski**. Would the gentleman yield?

Mr. **Gilman**. Yes, I would be pleased to yield to the chairman.

Mr. **Sikorski**. I think the gentleman makes an important point that was raised with the GAO as well. You are responsible to ensure that accuracy, fair treatment exist for Federal employees, and you did issue that you have a role under the Executive Order issuing the guidelines. You negotiated with Congress on the language of the supplemental appropriations to reach this goal of uniformity. I'm not proposing that you are doing it, but you can't wash your hands of your responsibility as OPM director to ensure uniformity in the designation of these testing positions. Somewhere, someone is going to have to bring these things together.

Mrs. **Horner**. Mr. Chairman, they have been brought together for review through the process the administration and Congress agreed to.

Mr. **Sikorski**. And HHS has a certification role; that is not your certification role, but you are a member of the coordinating group—correct?

Mrs. **Horner**. Yes.

Mr. **Sikorski**. Okay.

Mrs. **Horner**. Are you suggesting, Mr. Chairman, that you think someone ought to review every position in Government to see whether every cook and bottle-washer is properly tested or not tested?

Mr. **Sikorski**. I think the point raised by the gentleman from New York with the GAO and with you, and the point raised in the GAO study, is that there is no criteria for establishing a designated position. Beyond that, if a person who is put into one of these randomly tested positions is brought into the pool that will have to go to the bathroom when they are tapped on the shoulder and they want to challenge that, there is no uniformity and structure as to how to deal with it.

Furthermore, there is no uniformity with regard to how the employees are going to be treated after a positive test; there is no uniformity of treatment with regard to access to information by an individual who has been tested positive; no uniformity of procedure of an individual who appears before a medical review officer saying, "I know I tested positive; I'm on a prescription drug; here's the background;" no uniformity as to what supervisors, if any, are going to get that information.

Then, finally, there is a question of just oversight: who is in charge of this program in the administration.

Mrs. **Horner**. Mr. Chairman, with all respect, to the contrary, I think there is uniformity on every one of those counts. I'm not sure I got them all down, but I'd like to review each one.

Mr. **Sikorski**. It comes from GAO testimony.

Mrs. **Horner**. Yes, Mr. Chairman. I was very distressed at the import of some of that testimony, because it suggested to me that we need some better communication with GAO over the contents of the guidelines and the law.

Mr. **Sikorski**. With all due respect, they went through those plans, and they compared the apples in HHS with the apples in Education and those in Defense and the rest of it.

Mrs. **Horner**. Mr. Chairman, I think I can elaborate. I think in one respect GAO is assuming the necessity for a kind of uniformity that I don't assume the necessity for. But in another respect I think they simply don't know why it is we didn't do what GAO implied we ought to do.

With respect to discretion over disciplinary actions, for instance, I understand the committee and GAO both seem to think it would be advisable to have spelled out what is going to happen to you specifically, Government-wide, under every circumstance of a finding of drug use.

The Civil Service Reform Act of 1978, which radically redefined the organization of personnel management within the Federal Government, made a very strong point of allowing agency management considerable leeway in disciplinary actions for any reason, whether it is for insubordination or someone being AWOL, or whatever. There is a lot of leeway in making decisions about how much to punish an employee under a given circumstance, and there were several reasons for that, one of them being that what is a terrible infraction in one circumstance may be totally understandable in another circumstance. The agency head has to be able to exercise some judgment.

The situation of being found to be a drug user in the Federal Government is another instance of a circumstance in which an agency head has to exercise some leeway, just as for any other infraction of a Federal rule, and we did not think it was appropriate, or even perhaps legal, to specify Government-wide when the act specifically tells us that the agency head should have some discretion.

Now, we did offer guidance for uniformity that was pretty strong, I think, and pretty protective of employee interests and rights. For instance, it will be a very unusual case where any employee would be asked to leave Government service on a first finding of drug use; it would be very unusual, and GAO found only one plan in the whole Government, and that was the U.S. Marshals' Service, and I think we might understand why they need it there.

But it is precisely the necessity for that kind of leeway, where somebody has to say, "Yes, the Marshals, maybe the Secret Service, but for the rest of the Government no, we don't want to have uniform rules that mandate what could turn out to be a cruel punishment given some circumstances or an insufficient punishment given others."

Now, as for employee access to information, I think we do offer extremely careful provisions for that. If you would like an elaboration of that, I'm sure Mr. Barnes could provide it. We bent over backwards to protect privacy. We bent even farther over backwards after conversations with the Congress during our negotiation. I am very confident there is protection of privacy and confidentiality of access to information and records.

As far as being able to appeal the designation of your position as testingdesignated, every agency should have an individual assigned to review such designations. There are a few who apparently have not thought to do it. I am sure they will in the first instance it is required, and there will be uniformity in that regard; there will be someone in every agency that someone can go to to say, "I don't think my position should be tested" I am sure there are other areas of concern you have, and I think that I could respond satisfactorily to them in light of the GAO testimony.

Mr. SIKORSKI. I thank the gentleman for yielding.

Mr. GILMAN. Thank you.

Director Horner, your authority for this program comes under the President's Executive Order 12564. Is that correct?

Mrs. HORNER. Yes, sir.

Mr. GILMAN. And you have defined your responsibilities in your testimony. You say your role is clearly defined in that you are required to issue Government-wide guidance to the agencies on the implementation of the order, continue to pursue appropriate health insurance coverage for drug abuse counseling and treatment, develop model employee assistance programs for Federal agencies, and assist the agencies in putting assistance programs in place, and consult with HHS to develop and improve programs for Federal supervisors and managers on illegal drug use, and work with HHS on Government-wide drug awareness campaigns for the Federal work force, and you talk about your Helping Hand approach to working with the agencies.

Now you have sent them a model program. What have you done to make certain the model programs are being implemented properly?

Mrs. HORNER. First of all, because of delays incurred by congressional discussion and judicial action, we are only getting under way now.

Mr. GILMAN. When did the model programs go out?

Mrs. HORNER. September 1987 for the first Model Drug Free Federal Workplace plan, and then the second set in May of 1988, just this past May. In addition, OPM provided agencies with a Model Employee Assistance Plan in November 1986.

Mr. GILMAN. Do you have some plan for following up to make sure that a model program is in place and that it is being properly implemented?

Mrs. HORNER. Yes. OPM has a management oversight responsibility in this regard, as in many others Government-wide.

Mr. GILMAN. Who in your agency has that responsibility?

Mrs. HORNER. Our Personnel Systems and Oversight Group has general oversight responsibility for Employee Assistance Programs, and this would be one among other oversight responsibilities that we have, not highlighted particularly.

Mr. GILMAN. How many people are in that group that will have the oversight responsibility?

Mrs. HORNER. May I supply that figure for you? I don't have that figure with me.

Mr. GILMAN. Yes, and could you tell us of any planned program that you have for conducting the oversight of the model programs as part of this Executive Order and the responsibilities you have assumed under the Executive Order.

[The information follows:]

The Agency Compliance and Evaluation arm of the Personnel Systems and Oversight Group has primary responsibility within OPM for oversight and evaluation of government-wide personnel management programs to ensure that they are being carried out in compliance with applicable laws, regulations, and OPM policy guidance. This function has 131 FTE's allocated.

In addition, OPM, as a member of the Interagency Coordinating Group (ICG), participated in the preparation of the model Drug-Free Federal Workplace plan used by the agencies and will continue to participate in that process in the future. As agencies develop their plans using the model plan, OPM, along with the other member of the ICG, will review the agency plans for consistency with the model and will determine any future need for adjustments in the model plan.

The President set out several specific responsibilities for OPM in Executive Order 12564. OPM was required to issue government-wide guidance on implementation of the Order; ensure appropriate coverage for drug abuse under the Federal Employees Health Benefits Program; develop a model EAP and assist agencies in putting it in place; and, together with HHS, mount a drug awareness campaign for the Federal workforce. We have fulfilled these responsibilities.

Finally, through our traditional and continuing responsibility to assist the agencies in carrying out their responsibilities for managing their workforces, OPM maintains the Federal Personnel Manual system by which we disseminate personnel management guidance. We ensure that the agencies receive helpful information and useful guidance on how best to manage the Federal workforce.

Mr. GILMAN. I note that one of the counsel for one of the employee groups, Mr. Roth, has indicated some specific criticisms of what has been done so far, besides talking about the wide net and the unnecessary testing of some of the people who are not in sensitive positions. He also notes that the drugs tested for are not uniform between the agencies. Is that correct? Is there a lack of uniformity of what they are testing for?

Mrs. HORNER. I believe GAO just reported that, although virtually all agencies test for the permissible drugs.

Mr. GILMAN. For what drugs?

Mrs. HORNER. The drugs permissible under the guidelines.

Mr. GILMAN. What drugs should they be testing for?

Mrs. HORNER. Mr. Chairman, I said, although virtually all the agencies are testing for the drugs specified in the guidelines, there are a few, apparently, according to GAO, which are testing for fewer than all of the permissible drugs.

Mr. GILMAN. Do you know what they are testing? Do you receive any reports? Have you checked on what they are testing? Who keeps an eye on what they are testing and whether they are doing too little or too much?

Mrs. HORNER. The Department of Health and Human Services does that.

Mr. GILMAN. You don't do any of that?

Mrs. HORNER. No.

Mr. GILMAN. Have you received any reports about the lack of uniformity in the kinds of drugs they are testing, and do you feel that that would come within the purview of your responsibility to make certain that this program is being properly implemented?

Mrs. HORNER. That is a substantive scientific question, with respect to what drugs ought to be considered for this, and I would defer to HHS on this.

Mr. GILMAN. You would absolve yourself of all responsibility of whether or not the program is being properly administered with regard to whether they are testing for aspirin or testing for heroin?

Mrs. HORNER. Mr. Chairman, as a Roman Catholic, I know you can only be absolved when you have sinned, and in this case, since I don't think that a scientific issue of that sort is within my agency's capacity to judge, then it would be inappropriate for my——

Mr. GILMAN. Well, assume HHS gives you a report that this Agency X is testing for heroin, Agency Y is testing for marijuana, and Agency Z is testing for PCP, don't you think then that you would have sufficient information to make certain that there is some uniformity in the kind of drugs that they should be testing for?

Mrs. HORNER. Congressman, I would like to ask Mr. Barnes to respond to that.

Mr. BARNES. Congressman Gilman, perhaps I could——

Mr. GILMAN. Could you identify your title?

Mr. BARNES. Yes, sir. I'm Associate Director for Administration at the Office of Personnel Management and Mrs. Horner's special counsel for drug abuse matters. I have also been participating in the Interagency Coordinating Group for the last year and a half.

The responsibility for the types of drugs permitted to be tested is established under the HHS scientific and technical guidelines. That is where the authority for the drugs that can be tested——

Mr. GILMAN. What drugs do you require to be tested?

Mr. BARNES. There are five drugs that are tested. Two of them are the minimum that must be tested for; that is, marijuana and cocaine.

Mr. GILMAN. Heroin isn't a minimum test?

Mr. BARNES. Heroin is in the opiate category, sir. It is permitted to be tested for out of the five categories.

Mr. GILMAN. You said there were two that must be.

Mr. BARNES. Yes.

Mr. GILMAN. You said cocaine and marijuana.

Mr. BARNES. Marijuana and cocaine.

Mr. GILMAN. But heroin is not a mandatory test?

Mr. BARNES. It is, because it falls within the opiates category—excuse me, sir. Yes, that is correct. There are only two that are absolutely required, and five may be tested for.

Mr. GILMAN. So an agency doesn't have to test for heroin then. Is that right?

Mr. BARNES. It is possible that it may not have to test for it; that is correct, sir.

Mr. **Gilman**. Why the distinction? Heroin, it seems to me, is even a more highly addictive and more dangerous drug than cocaine or marijuana. How is it that is not a mandatory test?

Mr. **Barnes**. Dr. Walsh will be testifying before the committee today, sir, and I think he will probably discuss the data in the general population on the use of certain types of drugs, marijuana and cocaine being the most prevalent ones, and in some cases it may not be cost efficient or, in the agency head's discretion, make sense to test for that particular drug at that agency.

Mr. **Gilman**. So any agency could decide, under the discretionary criteria that you have set forth, that they don't have to test for heroin. Is that right?

Mr. **Barnes**. Under the HHS scientific and technical guidelines, they are required to test for marijuana and cocaine, and they can test for three additional categories. The additional categories include heroin. So the answer to your question is yes.

Mr. **Gilman**. What are the other two additional discretionary categories?

Mr. **Barnes**. Sir, I'd have to look at the list, but I think it includes barbiturates and PCP.

Mr. **Gilman**. The HHS guidelines require that if an employee being tested exhibits unusual behavior or appearance, the test site monitor is required to note that. What would you consider to be normal behavior in the setting of a urine test?

Mr. **Barnes**. I'm sorry, sir, are you directing this to Mrs. Horner or to me?

Mr. **Gilman**. To anyone on the panel. These are some of the guidelines. I assume that you have reviewed these guidelines, and what we are trying to find out is, are these guidelines adequate? Are they equitable? Are they being properly administered?

Mrs. **Horner**. Congressman, those are guidelines promulgated by the Department of Health and Human Services and reviewed by the Congress, and I would respectfully suggest that Dr. Walsh can give you an informed answer on this; I couldn't really.

Mr. **Gilman**. Director Horner, HHS established some guidelines. Were they submitted to you to look over to see if they are equitable and fair and good standards and appropriate criteria to use in a program?

Mrs. **Horner**. I am quite sure that——

Mr. **Gilman**. Has your agency reviewed those guidelines?

Mrs. **Horner**. Yes, we did have an opportunity to look at the guidelines. However, my agency is not staffed with scientists and people accustomed to the procedures of scientific and technical laboratories. Therefore, although we certainly had every opportunity to look at them, we are not competent judges.

Mr. **Gilman**. Do we need a scientist to determine unusual behavior of appearance while they are taking a urine test? Is that scientific in nature?

Mrs. **Horner**. No, it isn't. I was speaking in the context of reviewing all of the guidelines.

Mr. **Gilman**. While I'm pointing this out, it seems to me that there are some of the criteria that leave a lot to be desired, and I would hope that your agency is going to examine these more thoroughly since you are dealing with employee rights, and it would seem to me that we would want to make certain that in undertaking a drug testing program—and I'm supportive of a fair and equitable drug testing program in sensitive positions—it would seem to me that you ought to make certain that it is being properly administered, that there are proper guidelines, so that we are not going to be confronted with objections and obstacles that may throw out the entire program in the court system, and I would hope you would take a look at that.

Mr. Roth, the attorney for the American Federation of Government Employees, also points out that there are no standards set for the collection site persons who collect the samples and monitor the program. What are your comments with regard to that concern?

Mrs. HORNER. I would suggest that there are, but, again, I would have to defer to Dr. Walsh.

Mr. GILMAN. This isn't scientific. I'm asking you a factual situation now. Are there minimum qualifications established for collection site persons?

Mrs. HORNER. Yes, Mr. Barnes tells me that the laboratory certification standards do include minimum qualifications. Therefore, the answer is yes.

Mr. GILMAN. For collection site persons?

Mrs. HORNER. Yes, sir.

Mr. GILMAN. Could you submit those qualifications, or do you have them available right now that you could read them?

Mrs. HORNER. We could ask Dr. Walsh to provide what information he has on that.

Mr. GILMAN. I'm asking if you would submit those qualifications to us and they be made part of the record.

Mr. Chairman, I'd like to make them part of the record.

Mr. SIKORSKI. Without objection.

[The information follow:]

The Departent of Healh and Human Services, Alcohol Drug Abuse and Mental Health Administration, National Institute on Drug Abuse, Office of Workplace initiatives, has not written qualifications standards per se for inclusion in the Scientific and Technical Guidelines but has in progress draft training guidelines which will include a training program for collectors and a specimen collection manual. It is anticipated that, like the HHS Medical Review Officer manual that supplements the guidance offered in the Scientific and Technical Guidelines, these materials will be issued to all Federal agencies to use as they implement their programs.

Mr. GILMAN. I will be pleased to yield to the chairman.

You had some questions?

Mr. SIKORSKI. The question naturally flows, are the collectors going to be randomly tested?

Mrs. HORNER. I don't know, sir.

Mr. SIKORSKI. Thank you.

Mr. GILMAN. Director Horner, Mr. Roth also notes that the guidelines do not sufficiently define the unusual behavior, appearance, and we got into that, and I would hope that you would take a look at that aspect, since it seems to leave something to be desired as an adequate guideline.

He also notes that the guidelines do not require sample splitting, which should be made available to fully protect the employee from any mistakes. Would you care to comment on that recommendation?

Mrs. **Horner**. Yes, sir. I believe it is permissible, not required. This was not raised as an issue, to my knowledge, at the time we were engaged in discussions with the Congress, and therefore, it is a new issue after the fact. Certainly, it is permissible for an agency to do it, and I would see no reason, other than cost and concern about doubling the opportunity for error in the chain of custody, that would deter anyone from doing it.

Mr. **Gilman**. I note that in Mr. Roth's statement before the committee—and you probably have a copy of it—he said that on April 29 of this year before the Senate Appropriations Subcommittee on Labor, Health, and Human Services in Education, Senator Mikulski asked the Secretary of HHS, Otis Bowen, if sample splitting was required, and Bowen required, "I think that it is a necessity, and, yes, I think that is something that is sort of taken for granted."

Mrs. **Horner**. Yes, Mr. Chairman, there are two kinds of sample splitting, and I may be talking about one kind and Secretary Bowen about another.

Mr. **Gilman**. What are the differences in the Horner splitting and the Bowen splitting?

Mrs. **Horner**. You flatter the technique with these designations, sir.

I think that one kind involves taking a sample and immediately splitting it in two so that one is reserved to be checked on later. Another kind of split sample permits a subsequent evaluation of the same specimen but a sample is split off and sent to another lab after the first testing.

Mr. **Gilman**. I think what we are talking about essentially is to have one sample be available for an independent test in the event there is some mistake, and I think that is what we are looking for.

Is there some mandate in the guidelines, in the model programs, that there be some sample splitting to protect the employee?

Mrs. **Horner**. I'd like to have Mr. Barnes explain the HHS approach to that.

Mr. **Gilman**. I would be pleased to have Mr. Barnes explain that.

Mr. **Barnes**. Mr. Gilman, during the development of the HHS scientific and technical guidelines, which, of course, Dr. Walsh can speak to more fully, the issue of split sampling was commented on to the individuals in charge of guideline the drafting process.

Mandatory split sampling was not required under the HHS scientific and technical guidelines. However, it wasn't prohibited either. What, in fact, has occurred is that, during impact and implementation bargaining with labor unions split sampling can be a provision that can be agreed to, as long as what the union proposes does not conflict with our standing position on this issue, as presented to the FLRA in still-pending negotiability disputes. In fact, at OPM, with Local 32, we have agreed to a so-called split sampling provision in our impact and implementation agreement, providing for the retesting of a portion of the laboratory-retained sample if the first test was positive, and the employee requests retesting. So it is not mandated, yet it is not prohibited.

Mr. **Gilman**. Dr. Bowen seems to think it is a necessity. Do you disagree with Dr. Bowen?

Mrs. Horner. Congressman, I would like to plead with you to allow Dr. Walsh to respond. I am very concerned that I may be engaged in a lengthy discussion based on misinformation or too little information.

Mr. Gilman. All right. I would hope that you would take a look at what Otis Bowen is suggesting. If he feels it is a mandate, I would hope that your regulations would require it.

Mr. Sikorski. Would the gentleman yield?

Mr. Gilman. I would be pleased to yield to the chairman.

Mr. Sikorski. I thank the gentleman for yielding.

You were part of the negotiation on the language, and that language in the supplemental appropriation last year said "best technology available."

Mrs. Horner. Yes, sir, that is correct.

Mr. Sikorski. Since you are in charge of the personnel for the Federal Government, over 2 million people, and it all comes up to you for protecting their rights, their interests, their justice. It seems to me that this issue should take more attention in that there seems to be a conflict between "best technology" and cost, and I'm wondering where the Federal employee ends up in that situation.

Mrs. Horner. Mr. Chairman, I will take a look at this issue. I am concerned about the committee's concern and precisely the concern you have just raised.

Mr. Sikorski. Thank you. I thank the gentleman.

Mr. Gilman. We appreciate your willingness to make a review of that issue.

Director, Counselor Roth also says the guidelines should explicitly require reanalysis of previously run positive specimens whenever an error is detected. Would you care to comment on that?

Mrs. Horner. I'm sorry, would you please repeat that?

Mr. Gilman. Yes. The guidelines should explicitly require a reanalysis of previously run positive specimens whenever an error is detected.

Is there some procedure for protecting the employee and providing that kind of a reanalysis?

Mrs. Horner. Yes, sir, there is. I'd like Mr. Barnes to describe it.

Mr. Gilman. Mr. Barnes.

Mr. Barnes. Mr. Gilman, again, under the scientific and technical guidelines promulgated by HHS, first of all, there is an initial screening test, the so-called emit test. That is not counted as a positive test until it has been confirmed by the so-called gcms confirmatory test. I'm not sure if that is what Mr. Roth is referring to or not, but there is a double check system before any result is reported, and, furthermore, even after the lab——

Mr. Gilman. Mr. Barnes, if I might interrupt.

Mr. Barnes. Yes.

Mr. Gilman. You tested an employee; he says error; you've made a mistake. Is there some mandate now for reanalysis?

Mr. Barnes. The mandate for reanalysis is vested with the medical review officer.

Mr. Gilman. Now you are saying it is discretionary if you are saying it is vested with him. I am asking, is there some mandatory procedure written into the guidelines?

Mr. BARNES. Yes, there is a mandate in the HHS——

Mr. GILMAN. For reanalysis if the employee contends there was an error?

Mr. BARNES. Yes.

[The following additional response was furnished:]

There is a mandate in the HHS Scientific and Technical Guidelines that all specimens testing positive since the last satisfactory quarterly quality control findings be retested when a blind quality control specimen has been incorrectly reported by an HHS-certified laboratory. However, if an employee simply "alleges" that an error has occurred, there is no requirement for a retest absent a provision covering such a situation in a negotiated collective bargaining agreement. Further, an MRO can order a retest if he or she deems it necessary to do so, whether or not an employee alleges laboratory error.

Mr. GILMAN. Thank you.

The final comment that Mr. Roth makes is that the guidelines should ensure that lab standards are upheld by requiring unannounced inspections of the lab. Do you do any of that? What are your comments? That is to make sure that the labs are properly——

Mrs. HORNER. HHS is required to do that, sir.

Mr. GILMAN. HHS inspects the laboratories?

Mrs. HORNER. Yes, sir.

Mr. GILMAN. I want to thank you then for your comments.

There is one more. Employee confidentiality should not be better protected by explicitly allowing employees to not disclose medical conditions and prescription drug use unless their tests are positive. Do we protect the employee with regard to a breach of confidentiality?

Ms. HORNER. Yes, Congressman, we do, and I would like just to have Carrol Kinsey say a word or two on that. I agree with you, it is extremely important.

Mr. KINSEY. Thank you, Mrs. Horner.

Congressman Gilman, there are provisions, first in the Supplemental Appropriations Act, which provide for and require confidentiality. In addition, there are provisions in the individual agency plans which describe talk about where the information goes—that it goes to a medical review officer, he looks at it, makes those determinations about medical conditions, whether it is legitimate use of a drug, and so forth.

Mr. GILMAN. That protects it once it is submitted, but what about the need for providing that kind of information if they have not been tested positive?

Mr. KINSEY. There is no requirement that they provide that up front. They do have the opportunity to do so. If, in fact, the test comes back positive, they have the opportunity to provide that information.

Mr. GILMAN. So there is no requirement that they provide any of that medical information unless they are tested positive.

Mr. KINSEY. That is correct.

If I can add, we felt that it was important that employees not be required to provide such information unless there is an absolute need to respond to a positive test result.

Mr. GILMAN. I appreciate the panel's response, and thank you, Mr. Chairman.

Mr. SIKORSKI. I thank the gentleman from New York, and, again, I thank the director.

I have a whole host of questions, but in the interests of time in order to get to Dr. Walsh and the testimony of the representatives of the employee unions, we will submit some of those in writing and forgo the others. But there still are a couple of basic questions bouncing around the room. The first is, who is in charge of this program?

Mrs. HORNER. Would you like me to respond now to that?

Mr. SIKORSKI. Yes.

Mrs. HORNER. This is a personnel practice, like many other personnel practices in the Federal Government. The agency head is in charge of implementing the law, the Executive Order, and OPM guidance. The review processes are the same as they are for other personnel practices in the Federal Government, with some additional ones because of the sensitivity of this program.

Various components within Government have responsibility for various components of the program, and, Mr. Chairman, I think that is not an unusual phenomenon.

Mr. SIKORSKI. Who is going to be responsible, if we could measure the success or failure of this program? I don't think we can because we don't have the objectives of the random testing out. Whether we are trying to scare people through deterrence or find people who are actually abusing drugs are two open questions that haven't been answered from what we see in those 4,500 pages.

But if we could judge the success and failure, who would be responsible for the success or failure?

Mrs. HORNER. I think OPM would be.

Mr. SIKORSKI. Then it seems to me you take on much more responsibility for the uniformity issue, the cost issue, the issue of continuing oversight, and the fourth issue of protection of employee rights, which is probably your central responsibility. I haven't seen that demonstrated thus far, and I am not so sure that you are in the position structurally to take over those responsibilities under the current arrangement.

Mrs. HORNER. Mr. Chairman, you posited your question, if we could judge some large overall success or failure on the assumption there would be one agency which would properly do that. I don't accept the assumption, because I think OMB has got to make cost judgments. We would certainly tell them what we think, however.

Mr. SIKORSKI. I have done some figuring here, and I am not a mathematician, but you say there are 1,975,000 Federal employees; 17 percent of them are going to be Tier I employees and 17 percent of them are going to be randomly tested. That comes out to roughly 345,000 Federal employees. Those are big numbers still, and if 1 percent of them show up as identified illegal drug users, that is about 3,500 people. If the top figure suggested by GAO of $65,000 per identified drug user for this program is correct, this is going to cost us $227 million.

Mrs. HORNER. Mr. Chairman, I'd like to take a look at the basis for GAO's figures, because I think GAO is incorporating figures for ongoing actions the Federal Government takes with respect to personnel all the time that are already paid for. But that being said, there are losses to safety, security, productivity, to which one could attach a dollar figure, and I think if we did we would find the cost of drug testing, assuming it acts as a deterrent, to be well worth it.

Mr. SIKORSKI. The other figure is that if you take the 5 percent figure that OMB suggests and take the upward figure of $17,000, you end up with $297 million to identify 17,000 Federal employees who are users of illegal drugs—$297 million or $227 million to locate anywhere from 3,500 to 17,000 Federal employees. Now you suggested that that might be worth the money if we look at productivity in the Federal work place.

How big is this problem for illegal drugs in the Federal work force?

Mrs. HORNER. Mr. Chairman, we don't know. We probably would not be warmly greeted if we asked.

Mr. SIKORSKI. We don't know, and how can we judge the usability of this money, whether the taxpayers are getting their money's worth for every dollar spent in this program, if we don't know the size of the problem?

Mrs. HORNER. I will tell you why I think it is acceptable to move ahead even in the face of our not knowing with any precision how many drug users there are. The Federal work force is extremely varied. It shares many, if not all, characteristics with the national work force. We know we have a national problem. We want to help our employees. It has been demonstrated again and again that calling their attention forcefully to their problem offers an opportunity to help. We think we should move ahead and do it because it is the right thing to do. We, as a Federal work force, have to make our contribution to the national work place solution.

Mr. SIKORSKI. I'm not against random testing. I think there are a lot of relevant security and safety issues. There is a role for random urinalysis. I guess the question is, do we begin our program on attacking drug abuse in the Federal work force with a massive urinalysis of Federal employees who tend to be older than the non-Federal work force as a symbol for the private sector and others. And from what data we have, who tend to be more drug-free than the other part, especially when we are talking about hundreds of millions of dollars here?

I ask that as a rhetorical question, because clearly you have your position, and the President has established that position.

I guess the next question that comes to my mind is, we know alcohol abuse is much more widespread and much more devastating to productivity, and we aren't touching that.

Mrs. HORNER. Mr. Chairman, I agree with you that it is much more widespread, that it is an extremely serious problem, but I believe we are touching it. We are not touching it with testing. We aren't using breathalyzers, and I think there are some reasons for that. But our employee assistance programs are certainly forcefully attending to the alcohol problem in the Federal Government.

Mr. SIKORSKI. The employee assistance program, from the best guess I have seen, is about $20 million?

Mrs. HORNER. That is right.

Mr. SIKORSKI. Here we are talking about hundreds of millions of dollars, and this doesn't get to the really costly problem of dealing with these human beings after we have designated them.

Mrs. HORNER. Mr. Chairman, two years ago, for the first time ever, I required all the insurance carriers who cover Federal employees—that is about 430 carriers—to offer drug and alcohol treatment and counseling as part of their coverage. That is a great deal of money.

Mr. SIKORSKI. That is highly commendable, and you deserve commendation for that.

Mrs. HORNER. That needs to be counted when we are talking about how much is spent. I am sure that had an effect on premiums and on the Government contribution to those premiums.

Mr. SIKORSKI. Those plans, with few exceptions, don't pay more than a percentage of those treatment programs, however.

Mrs. HORNER. They vary widely.

Mr. SIKORSKI. If you took the bulk of the 350,000 people who are going to be randomly tested and looked at their health insurance coverage, you would find very few of them would have drug or alcohol treatment, in-patient coverage, paid for.

Mrs. HORNER. Mr. Chairman, Blue Cross-Blue Shield, which covers 40 percent of Federal employees, does have in-patient coverage. So, in fact, our coverage is quite thorough.

Mr. SIKORSKI. Full, 100 percent, in-patient coverage?

Mrs. HORNER. There may be a deductible.

Mr. SIKORSKI. I think there is a deductible, and I think there are restrictions on that as well.

Mrs. HORNER. I would like to provide you with that information. I think it is quite substantial coverage.

Mr. SIKORSKI. Okay.

[The information follows:]

The following is information on the drug abuse treatment coverage offered by Blue Cross/Blue Shield in the Federal Employees Health Benefits Program:

Blue Cross/Blue Shield does cover 40 percent of Federal employees. High Option Blue Cross/Blue Shield coverage covers in-patient care for alcoholism and substance abuse for one treatment program per lifetime, with a 28-day maximum, for up to $3500. There are two deductibles applicable to High Option: a $50 hospital admission deductible and the $200 per calendar year deductible. Blue Cross/Blue Shield pays 80 percent of the patient bill for hospital facility charges. It pays 70 percent of the patient bill for physician charges. Standard Option covers in-patient care for alcoholism and substance abuse for one treatment program per lifetime, with a 28-day maximum, for up to $2500. The deductibles for the Standard Option are a $100 hospital admission deductible and a $250 calendar year deductible. Blue Cross/Blue Shield pays 60 percent of both hospital facility and physician charges under Standard Option.

Mr. SIKORSKI. Refocusing again, we looked at numbers and costs; we haven't quite found out who is in charge and what the goals of the program are, and we have been asking those questions for a couple of years now. I would like to just touch again on this uniformity issue, because it is clearly in your area, and save the questions of procedures and guidelines for the actual testing process for Dr. Walsh.

The President's Executive Order said we're going to test Federal employees who are in sensitive positions. I think the GAO raised concerns about the wide variance between what is considered a sensitive position. You have suggested reasons which pertain to security, public safety, law enforcement, high trust, and confidence. They sound reasonable to me.

But we see that supply technicians, land law examiners, photographers, computer systems analysts, and plate makers, just to name a few, who have no immediate impact, and are out of the security area, the Department of Defense, the Department of Energy's nuclear program, and out of public safety are in testing; they are TDP's.

We have one example. Space management specialists at the Department of Justice are going to be tested because "unwise space usage determination" could result in the rental of excess office space. Did the President have the space management specialists at the Department of Justice in mind when he issued his order talking about sensitive positions?

Mrs. HORNER. Mr. Chairman, without trying to read the President's mind, there were considerations. I think most of us envisioned considerations of public health and safety, law enforcement, and so on, as identified in the Executive Order. The agency mission can affect the impact of a position in terms of whether it is appropriately testing-designated or not. I think that it is entirely appropriate, and we have a provision for, an employee who feels that his or her position is improperly designated to say so and to get some attention for that objection and to have it resolved. We have all the customary procedures in place for an employee to use. If the space management specialist thinks that it is not justified, he or she is able to go through the process we have in place to get redress of that grievance.

Mr. SIKORSKI. The point here is that there should be discretion, but there is a point at which discretion becomes so wide that employees are subject to unfair dissimilar treatment that borders on discrimination between a person similarly situated in one agency and a person in another agency, and that then triggers your concern.

There are some very bizarre justifications set out for some of these, and unless someone is there checking to make sure that this discretion isn't being abused, you are going to have a very costly and delaying procedural system triggered if what you are suggesting is accurate.

If every space management specialist in the Department of Justice or any other person is tested, I would guess, 8 or 10 percent of these 350,000 you tested will result in 35,000 appeals of TDP. Is that what you are suggesting?

Mrs. HORNER. I am suggesting that there is probably going to be a small number of mistakes that I think any sensible person could make. Wherever there is discretion there are mistakes, and fortunately, we have in place a mechanism which works extremely well to adjust for mistakes like that. I don't see any need to develop yet another mechanism in the Federal Government.

We already have an administrative grievance mechanism, we have a union grievance mechanism, we have the MSPB, we have the Federal courts, we have a tremendous panoply of mechanisms to adjust wrongs in the Federal Government. I think we have enough mechanisms, and I think they will work in any case that needs it.

Mr. SIKORSKI. Who makes the decision regarding the appeal of the space management specialist at the Department of Justice?

Mrs. **Horner**. I am not certain, but I believe they have not yet designated the person to whom the appeal is to be made. Most agencies have, and they will.

Mr. **Sikorski**. Isn't the DOJ one of those agencies that has been certified? Have they given a 60-day or 30-day notice?

Mrs. **Horner**. I believe they have, and they will shortly recognize, if they haven't already, that they need to designate someone to hear an appeal when the first appeal arises. DOT's Offices, Boards, and Divisions Plan does designate the Assistant Attorney General for Administration to hear those appeals.

Mr. **Sikorski**. So we may have people in bathrooms urinating in cups before this appeal process is decided?

Mrs. **Horner**. No, Mr. Chairman, because as soon as the 30-day notice arrives the employee may grieve—may complain, and nothing can happen until that is resolved.

Mr. **Sikorski**. We are going to have a lot of grieving employees then.

Let me ask you, if the administration feels the drug testing program is important enough to allot up to $300 million to find these few thousand Federal employees, it strikes me as odd that the administration has not requested a line item for NIDA, the National Institute of Drug Abuse, in its budget process. The Office of Workplace Initiatives, where this thing comes back to like a homing pigeon, is being funded, as I understand, out of discretionary funds, transportation funds, and funds taken from other budgets.

Mrs. **Horner**. Mr. Chairman, I think Dr. Walsh could probably speak to that. We absorb many new activities each year as priorities change in each agency.

Mr. **Sikorski**. I guess I see this thing coming up on even-numbered years, and I'm concerned about whether this is a real interest or a public relations campaign.

Let's touch on the nexus issue. I've heard a lot of sweeping generalizations, from every side, that the Civil Service Reform Act—and some other laws, but let's focus on the Civil Service Reform Act—is not being paralleled in this program; yet you say that it is. Say we get 3,000 or 17,000, the small and top numbers, designated with positive tests. Under the guidelines, they can be disciplined with a letter of reprimand up to a dismissal. Under the Civil Service Reform Act, it is my understanding of the court actions taken that there has to be a nexus between official work, between the work of the employee in Government performance, and the illegal act or the complaint of behavior.

Mrs. **Horner**. Yes, Mr. Chairman, that is true. There must be a nexus or connection between the action and the efficiency of the service under the Civil Service Reform Act.

Mr. **Sikorski**. Are you making the case that the the nexus is between the fact that Federal employees are just breaking the law and that as Federal employees expected to obey the law?

Mrs. **Horner**. I'm sorry, I couldn't hear that.

Mr. **Sikorski**. I guess I'm anticipating that the nexus for these people being disciplined simply forms because they have been identified as a drug user.

Mrs. **Horner**. The MSPB has ruled that drug use on or off duty may establish the necessary nexus to show that the efficiency of the service is not promoted by the drug use.

Mr. **Sikorski**. I guess I was right. The fact that they just violated the law is sufficient to affect performance?

Mrs. **Horner**. Yes, sir. Would you like a legal elaboration on that?

Mr. **Sikorski**. I guess I'm wondering, does that affect someone who is found guilty of driving while intoxicated as well?

Mr. **Kinsey**. If I might, Mr. Chairman.

Mr. **Sikorski**. Mr. Kinsey.

Mr. **Kinsey**. Thank you.

The case that we are referring to is one the MSPB handed down some time ago—last January, I believe—wherein some Bureau of Prisons officials were disciplined by the Department of Justice for off-duty drug use. That was the basis for the adverse action, the fact that they had consumed illegal drugs off duty. They were disciplined on that basis, and that discipline, while mitigated by the board to a lesser penalty, was, in fact, upheld by the Merit Systems Protection Board, the full board, on appeal.

What the board held was that with regard to particular kinds of positions—in this case, Bureau of Prisons corrections officials—with regard to those certain types of positions where illegal drug use on or off duty is antithetical, if you will, anathema, to the very basis of their Federal employment, in this case, being a corrections officer at a Federal corrections facility was sufficient to establish nexus, that no further proof had to be shown, and that was sufficient to make the nexus showing. So that is the basis.

Mr. **Sikorski**. Am I just a skeptic, or do I sense that there is a difference between the applicability of that precedent across the board for all Federal employees?

Mr. **Kinsey**. Certainly. It will depend on the nature of the position and whether or not the nexus is shown, whether or not the efficiency of the service is, in fact, impaired by the fact that the individual has engaged in that kind of activity.

Mr. **Sikorski**. What are you people doing to make sure that the nexus issue is being raised? In your guidelines, I think you point out the need to be compatible with the Civil Service Reform Act, but you don't point out the need to find a nexus.

Mrs. **Horner**. Mr. Chairman, we advise agencies on legality of personnel actions. This would come under this rubric, and we don't hesitate to do that. We don't hesitate to advise agencies on legality respecting the law relating to personnel actions, and we would not hesitate to do so in a case that would fall under this rubric.

Mr. **Sikorski**. There is no question here in this room then, that the Civil Service Reform Act has to be abided by?

Mrs. **Horner**. No question whatsoever, and our guidelines state that all laws and regulations that could be brought to bear should be brought to bear. Our guidelines and the Executive Order don't attempt to evade any standing law or regulation.

Mr. **Sikorski**. And there is no question here that there has to be a nexus?

Mrs. **Horner**. No, sir.

Mr. SIKORSKI. Finally, last year we discussed the issue of private contractors. We have two million Tier I Federal employees and x million non-Federal employees paid by the taxpayers through independent contractors with the Federal Government. We have these people doing some very sensitive work, working side by side with the most sensitive Federal employees. We have people who operate, design, maintain, and secure our nuclear weapons warhead production facilities, which are, by and large, contract employees in this country. Who is going to say they have to be randomly tested? When are we going to hear that?

Mrs. HORNER. The National Drug Policy Board has had a policy for about a year now to let agencies pursue possible implementation of contractor testing, provided they work it out with the Department of Justice to make sure that constitutional issues aren't raised and violated. So there has been that possibility for some time now, and I believe the Department of Energy has pursued that issue, and, as you know, the Secretary of Defense this morning—

Mr. SIKORSKI. In this morning's paper.

Mrs. HORNER. Yes.

Mr. SIKORSKI. I think that is commendable, but I am still waiting for the scale to come into some kind of balance for the Federal employee and the non-Federal, taxpayer-financed—non-Civil Service employee doing public work. I'm waiting for someone within the administration to stand up and say that if we are going to have 350,000 Civil Service employees randomly drug tested, we should have Federal employees in similar situations who are paid through independent contractors with the Federal Government, also randomly drug tested. It doesn't seem to be a difficult thing to mouth, but the President hasn't said it. The Secretary of Defense said it after the Congress threatened to call out the troops to staff the cocaine curtain and to use those resources that are needed at choke points and pressure points around the world for our national defense, for the drug war instead. At that time the Secretary said that he was going to ask that the independent contractors be drug tested as well, and we still haven't seen the results of that. They do some of that now.

The Department of Energy is doing more now than they did a year ago, and more then than two years ago, more then than five years ago when I first started looking at them. But no one in the administration said, "Let's treat Federal employees who work for independent contractors the same way we treat the Federal employees who work for the Federal Government through Civil Service."

Mrs. HORNER. Mr. Chairman, for just the reasons you outlined there has been discussion of this. There are different legal provisions relating to Federal workers and private sector employment situations that have inhibited us, but we are looking at them. OMB right now is reviewing the possibilities for language which would do what you suggest.

Mr. SIKORSKI. Let me suggest that someone, probably the Office of Personnel Management director, should stand up and say, "Federal employees, if you buy into the argument that random drug testing of this wide scale is necessary, you should also stand up and say those who are similarly situated in the non-Civil Service but Federal work force should be treated the same." If contractors and others raise problems, those contracts are changeable, they are being renegotiated all the way down the line, and if they want the Federal Government's business they should bring in the same kinds of guidelines and procedures that we are using across the board. I am still waiting. It has been two years now since the President issued his Executive Order, talking about sensitive positions, public safety, law enforcement, national security, trust and confidence, and everyone is focusing on the Federal employee.

I am simply suggesting that it has been my experience that the Federal employee is ripe pickings for these kinds of games, and I question the sincerity of those who want to accomplish something in terms of drug abuse if they ignore the similarly situated, non-Civil Service Federal employee.

Mrs. HORNER. Mr. Chairman, I have had some of these thoughts myself, and I think it is incumbent upon us to deal with our own circumstance first before we tell the rest of the country——

Mr. SIKORSKI. These are our people. They get paid the same way.

Mrs. HORNER. It has taken us two years—close to two years—to weave through the thorny problems of reaching consensus within the Government between the executive, legislative, and judicial branches just to do this.

I agree that Federal employees should never be used for political purposes or to try out ideas, but we have to do what is right, first within Government, then without.

Mr. SIKORSKI. I agree. I don't suggest that your sensitivities are elsewhere. I think you probably are parallel with my concerns, but maybe not as strongly stated. But I am still waiting for someone in the administration to stand up and say we ought to do it.

These people aren't outside of our purview. We require affirmative action, equal employment opportunities; we require all kinds of things of these people way beyond what is required of private sector employment, and yet no one in this administration has said these people should be treated with the same concern that we are treating two million plus Federal employees in the Civil Service. They get Federal taxpayer money, many times more handsomely than what the civil servant employee is getting. They get benefits extended to them. They get a host of things that come from the Federal taxpayers.

Is it unreasonable for us to expect now, after two years, for someone to stand up and say contract employee should be treated the same way?

Mrs. HORNER. Mr. Chairman, it is customary to reach a consensus within any administration before anyone goes and talks about his or her personal sentiments on a matter. Reaching such a consensus requires taking into consideration things like what the Department of Labor says about the impact on small business, what the Justice Department says about whether things will be upheld constitutionally. These things take a long time. It would be nice if we could offer the kind of moral reassurance that I think your statements offer by saying these things, but we have to say them when we are ready to act.

Mr. SIKORSKI. They call into question the sincerity and the objectives of the massive urinalysis program of the Federal employee sector; they really do.

Recognizing the subcommittee's concerns, we have not been able to focus on the employee assistance programs which you have focused your attention on. We will have a separate hearing on the employee assistance programs to note the successes of the Department and focus on some of the concerns we have.

I want you to know that your people spent a lot of time focusing on that, and it is appreciated by the subcommittees, as is your long time with us this morning. Thank you, Director Horner, Mr. Barnes, and Mr. Kinsey; thank you very much.

Mrs. HORNER. Thank you very much, Mr. Chairman.

Mr. SIKORSKI. Our next witness is Dr. Michael Walsh from the Department of Health and Human Services. Dr. Walsh is director of the Office of Workplace Initiatives at NIDA, the National Institute on Drug Abuse. He was one of the main authors of HHS's scientific and technical guidelines for agency drug testing programs and spent over 20 years examining the effects of drug use on job performance for the Federal Government.

Again, Dr. Walsh, it is a pleasure to have you assisting the two subcommittees on our oversight responsibilities on the drug testing program. Your entire statement will be placed in the record as you desire it, and you can spend your time responding to what has already been commented on, summarizing what you have written in testimony, or a combination thereof.

STATEMENT OF J. MICHAEL WALSH, DIRECTOR, OFFICE OF WORKPLACE INITIATIVES, NATIONAL INSTITUTE ON DRUG ABUSE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ACCOMPANIED BY JOEL MANGEL, DEPUTY CHIEF COUNSEL, PUBLIC HEALTH SERVICE

Mr. WALSH. Thank you very much, Mr. Chairman.

I would like to introduce Mr. Joel Mangel, who is with me this morning, he is the deputy chief counsel of the Public Health Service. Mr. Mangel is also a principal member of the Interagency Coordinating Group, which is a group that I chair, which was formed under the auspices of the National Drug Policy Board to provide guidance to all of the agencies in meeting the provisions of the Executive Order and the law. The Coordinating Group is made up of members from the Department of Health and Human Services, Mr. Mangel and I, Mr. Barnes from the Office of Personnel Management, and the Department of Justice is the third agency represented on the board.

With your permission, I would like to summarize briefly the activities that have occurred over the last year since passage of the Supplemental Appropriations Act, which, as has been stated earlier, required the Secretary of Health and Human Services to accomplish two principal major tasks: one, to publish mandatory technical and scientific guidelines and laboratory certification standards in the Federal Register for a notice and comment period and then publish a final version, and, secondly, that all agencies must develop plans, submit them to the Secretary, and the Secretary was responsible for certifying to the Congress that each agency had developed a plan for achieving a drug-free work place in accordance with the Executive Order, section 503 of the Supplemental Appropriations Act, and all other applicable provisions of law, and the plans must comply with the mandatory scientific and technical guidelines.

Subsequent to the passage of the act, which was last July 11, 1987, the National Drug Policy Board established the Interagency Coordinating Committee. As you are aware, the Office of Personnel Management and the Department of Justice had certain responsibilities under the Executive Order. In the Supplemental Approp. Act (PL-100-71) the Congress tasked HHS to provide oversight of the development of these agency plans and the certification to the Congress.

In August 1988 DHHS published the scientific guidelines and the laboratory certification standards in the Federal Register for notice and comment. During the month of August, the Interagency Coordinating Committee developed a model plan, which has been mentioned by the GAO in their testimony, and I would like to make a distinction here in that the model plan contains four major components. It is a comprehensive, drug-free work place plan that contains provisions for supervisory training, employee education, employee assistance, and testing.

What we submitted to the Congress were not simply testing plans. They are not, as some people call them, a "gotcha" plan, they are a comprehensive, drug-free work place plan which covers a variety of different components, and, in fact, the testing component is a very small part of the overall program.

That model plan was distributed to all Federal agencies in early September, and then, during the middle part of September, the ICG—the Interagency Coordinating Committee—conducted a three-day technical workshop in Charlottesville, Virginia, for all agencies designated as Tier I or Tier II agencies by the act. Approximately 200 Representatives from 50 agencies attended.

In Charlottesville, we tried to set the tone for the development of these agency plans, that they were not to be testing plans, that they were to be comprehensive, drug-free work place programs, and we provided extensive coverage in that technical assistance conference on employee assistance, labor relations, confidentiality, and Privacy Act regulations, the development of supervisory training programs, employee education programs, and a tremendous amount of time was spent explaining what we called a testing designated position decision guide, which is a ten-page document which the Interagency Coordinating Committee developed to assist agencies in going through their agency pd's on a position-by-position basis to decide which individual positions were so sensitive and so critical that they needed to be included in the random testing pool.

In October, the comment period closed on the Federal Register document. We began review of the comments and the recommended changes.

By the end of November, the agency's initial draft plans were submitted to the Department of Health and Human Services for review. Each plan was reviewed by no less than three members of each of the three agency teams. Comments and concerns were coordinated back to my office, and then the negotiations with the agencies began.

Throughout the months of December and January, there was continuous feedback being transmitted back and forth from the Interagency Coordinating Group to the agencies, and they were in continuous negotiations and modifications of plans to maximize uniformity and consistency.

I think from my perspective, despite the GAO testimony, there is a tremendous amount of uniformity and consistency across the plans. As the GAO witnesses testified, the agencies followed the model plan. There is a lot of boilerplate language in there which all of the agencies committed to.

The plans are very uniform and very consistent. They are not identical, and I think it would be unreasonable to assume that you could achieve identical plans across all of the agencies of the Federal Government, considering the tremendous variation in the missions of these different agencies.

By February, virtually all 42 agency plans were complete and had been transmitted to the Secretary with a recommendation for approval.

In early March, the final version of the mandatory guidelines and the standards for laboratory certification were cleared by the Secretary and sent to OMB for clearance. The guidelines were published in the Federal Register on April 11.

On May 3 the Secretary's report certifying the 42 agencies to the Congress was submitted.

The following week, on May 9, we held a second technical assistance conference for the Tier III Federal agencies, which amount to approximately 130 additional agencies, and the initial drafts of the Tier III plans are due to my office this week.

There has been a tremendous amount of other activities related to supervisory training, to employee education. We have developed a four-part video series. The first of the series has been completed, and all the Federal agencies were provided complementary copies.

We have developed, in coordination with the Office of Personnel Management, standards for employee assistance programs. We have developed also a drug abuse education curriculum for EAP practitioners to train them to be cognizant of the special kinds of considerations which are required in dealing with substance abuse disorders. This curriculum was developed by experts around the country and is being pilot tested during July and August—this summer—at three universities around the country, at the University of California at San Diego, the University of Georgia, and here at Montgomery College in Rockville, Maryland. The Office of Personnel Management has made all EAP practitioners in Federal agencies aware of these courses and is strongly encouraging them to attend. We hope to have that course in 50 or so universities by the next spring semester.

This is a quick overview of what has been going on in the last year of all the different activities that we have been working on. At this point, we would be happy to answer any questions that you may have.

[The statement of Mr. Walsh follows:]

J. MICHAEL WALSH, Ph.D.
DIRECTOR, OFFICE OF WORKPLACE INITIATIVES
NATIONAL INSTITUTE ON DRUG ABUSE
ALCOHOL, DRUG ABUSE, AND MENTAL HEALTH ADMINISTRATION

Madame Chairwoman, Mr. Chairman, and Members of the Subcommittees, I am Dr. J. Michael Walsh, Director of the Office of Workplace Initiatives of the National Institute on Drug Abuse (NIDA) of the Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA). We are grateful for the opportunity to participate in this hearing on the Drug Free Federal Workplace Program.

Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. Section 7301 note enacted July 11, 1987 (which I will refer to hereafter as "the Act) provides that no funds shall be available to administer or implement drug testing at certain prescribed Federal Agencies pursuant to Executive Order 12564, dated September 15, 1986, entitled a Drug-Free Federal Workplace (which I will refer to hereafter as "the Executive Order") until the Secretary of Health and Human Services (HHS) has certified to Congress that 1) each of those Agencies has developed a Plan for achieving a drug-free workplace in accordance with the Executive Order and applicable provisions of law, including applicable provisions of the Act; 2) HHS, in addition to Scientific and Technical Guidelines dated February 13, 1987, and any subsequent amendments thereto, has, in accordance with Section 503 (a)(1)(A)(ii), published mandatory guidelines for Federal drug testing programs (hereafter referred to as the "Mandatory Guidelines"). 3) each of those Agency's drug testing programs and Plans established pursuant to the Executive Order comply with applicable provisions of law, including applicable provisions of the

Rehabilitation Act of 1973 (29 U.S.C. 701 et seq), title 5 of the United States Code, and the mandatory guidelines referred to above. In addition, the Secretary of HHS was required to submit to Congress a detailed Agency-by-Agency analysis relating to 1) the criteria and procedures to be applied in designating employees or positions for drug testing, including the justification for such criteria and procedures; 2) the position titles designated for random drug testing; and 3) the nature, frequency, and type of drug testing procedures to be instituted. Also, the Office of Management and Budget was required to submit to Congress a detailed, Agency-by-Agency analysis of the anticipated annual costs associated with carrying out the Executive Order and all other requirements under this Section during the five-year period beginning on the date of enactment of the Act.

The Agencies covered by the above requirements are those specified in Section 503(a)(2) and are referred to as the Tier I agencies. Specifically, the Tier I agencies are the Executive Office of the President, Executive Cabinet Agencies (except the Department of Transportation and other entities covered by Section 503(b)), the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Office of Personnel Management, the Small Business Administration, the United States Information Agency, and the Veterans Administration.

In order to provide guidance to the Agencies in meeting these requirements and to promote uniformity in their Plans, an Interagency

Coordinating Group (ICG) was established under the aegis of the National Drug Policy Board. The principal members of the ICG are J. Michael Walsh, Ph.D., Chairman, Director, Office of Workplace Initiatives, National Institute on Drug Abuse, HHS; Mark Barnes, Associate Director for Administration Group, Office of Personnel Management; John Cruden, Special Counsel to the Assistant Attorney General, Civil Division, Department of Justice; and Joel Mangel, Deputy Chief Counsel, U. S. Public Health Service, HHS. The ICG developed a Model Plan which, in addition to promoting uniformity, established procedures to ensure that each Agency Plan addressed health related issues, met all statutory requirements and Federal personnel regulations, and incorporated all the requirements of the Act and of the Executive Order.

In September 1987 the ICG convened a technical assistance conference for Tier I Agencies to provide consultation on the development of Agency Drug-Free Workplace Plans. Each Tier I Agency subsequently submitted a Plan to the Department of Health and Human Services for a thorough review to determine compliance with the Act and the Executive Order. In consultation with members of the ICG, the Department of Health and Human Services has determined these Plans to be in compliance with the legislative requirements, personnel regulations and the provisions of the Mandatory Guidelines. An HHS Advisory Board composed of senior Departmental staff concurred in the decision of Donald Ian Macdonald, M.D., Administrator of the Alcohol, Drug Abuse and Mental Health Administration, to certify the Agency Plans under the Act pursuant to a delegation of authority from the Secretary.

The initial report, delivered to the Congress on May 3, covers only Tier I Agencies. Other Agencies will be the subject of one or more later reports to Congress by the Secretary of HHS as required under the Act. On April 11, the Secretary published guidelines for Federal Workplace Drug Testing Programs (53 Fed. Reg 11970).

Each agency has developed a comprehensive program that is not intended to be punitive, but to provide help to employees who need such assistance. A commitment of resources and emphasis has been made by these agencies and is manifested by the thoughtful and careful development of each agency plan. The following selected characteristics of the Drug Free Federal Workplace Plans developed by Tier I Agencies illustrate the comprehensive nature of these efforts.

o Each plan includes a clear policy statement which describes the impact of illegal drug use on the Agency's mission, specifies the Agency's expectations regarding drug use and the action to be anticipated in response to identified drug use.

o Each plan makes a commitment to employee assistance through development of a program emphasizing education, counseling, referral to rehabilitation, and coordination with available community resources.

o Each plan assures employees that personal dignity and privacy will be respected in reaching the goal of a drug-free workplace.

o Each plan includes a commitment to supervisory training to assist supervisors and managers in identifying and responding to illegal drug use by agency employees. Training courses include information on:

- policies relevant to work performance problems, drug use, and the Employee Assistance Program (EAP);
- how to recognize employees with possible problems;
- agency procedures for referring employees to the Employee Assistance Program;
- roles of key personnel, such as the Medical Review Officer, supervisors, personnel and the EAP; and
- The process of reintegrating employees into the workforce

o Each plan makes reference to the need for management to seek ways in which recognized bargaining unit representatives might assist in program implementation.

o Each plan includes provisions for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues.

o Each plan makes a committment to develop an employee education component which may utilize videotapes, lunchtime forums, drug awareness days and distribution of written materials.

o Each plan, consistent with the DHHS guidelines, requires the Agency's Medical Review Officer, who must be a licensed physician with knowledge of substance abuse disorders, to consult with the employee to examine alternate medical explanations for any positive test result prior to informing agency administrative officials.

o Each plan requires that any employee with a verified confirmed positive test result MUST be referred to the Employeee Assistance Program.

o Each plan offers an employee the opportunity to seek administrative relief if he/she believes his/her position has been wrongly designated as a testing-designated position.

o Each plan complies with all applicable provisions of law, the Executive Order and the Mandatory Guidelines on Federal Drug Testing.

o Most Agency plans include provisions for a "safe harbor," the intent of which is to provide an employee who voluntarily admits to illegal drug use with counseling or rehabilitation through an EAP. If that employee refrains from illegal drug use thereafter, he or she will not suffer any disciplinary action.

- Most plans have made a commitment to make available the services of the Agency's Employee Assistance Program not only to employees, but also, wherever feasible, to the spouse and dependents of employees who have drug problems, as well as to employees who have family members with substance abuse problems.

Costs for implementing the comprehensive Drug-Free Federal Workplace Plans in Tier I Agencies peak in 1989 when most of the employee education and supervisory training activities are scheduled. Total estimated costs for FY 1989 are $14.9 million, of which $11.6 million is for employee education, supervisory training and program administration; and $3.3 million is for testing-related activities including specimen collection, laboratory analysis, Medical Review Officer functions and quality control. The cost of implementing testing-related elements of the Program are estimated to be approximately $4 million for each of the subsequent three fiscal years (FY 90, 91, and 92). Costs for all other elements of the Program for these fiscal years are estimated to be approximately $7 million per year.

I will be happy to answer any questions you may have.

Mr. **Sikorski.** Dr. Walsh, who is in charge of the Government's drug testing program?

Mr. **Walsh.** The statute does not make clear, nor does it task a specific agency to provide the oversight.

Mr. **Sikorski.** How about the Executive Order.

Mr. **Walsh.** The Executive Order tasks the Department of Health and Human Services to provide guidance and oversight for the scientific and technical issues. The Department of Justice has certain responsibilities, as well as does the Office of Personnel Management.

Clearly, in the statute a great deal of authority was given to the Department of Health and Human Services in terms of providing an oversight role. We certainly, with regard to the testing component, have oversight in terms of the laboratory certification. We have a network of principal liaisons within each and every agency who report back to us, consult with us, on a daily basis as to those programs.

Mr. **Sikorski.** Let's get to the testing and the laboratory certification on the issue of who gets tested. I think the statement of GAO was that a uniform set of testing criteria will not be applied to the Federal work force, and even though there is boilerplate that is picked up and there are similarities through the plans, there are major differences between how employees similarly situated in different agencies are treated under this random drug testing program in terms of what drugs will be tested for, in terms of whether they will be tested at all, in terms of the likelihood if they are in the pool to be randomly tested, and then in treatment afterwards. There is a lack of uniformity.

Mr. **Walsh.** As you pointed out, the report exceeds 4,000 pages, and I think the task that you gave the GAO was a tremendous one. Having been through it, having read each and every one of those plans several times myself, and my staff spending an enormous amount of time putting that report together, I recognize that it would be difficult for GAO to become fully cognizant of all of the different aspects of these plans.

I would strongly argue there is a tremendous amount of uniformity and consistency. Each and every agency head used the same decision guide as to who is going into the pool. Every employee who will be tested will be tested by precisely the same procedures. The way in which their specimen will be analyzed will be precisely the same across all agencies. Any individual who has a confirmed positive test will be reviewed by a medical review officer and will have the opportunity for an interview with that medical review officer and an opportunity to provide any medical evidence that would legitimize a positive test result. Any employee who has a confirmed positive test must be referred to the employee assistance program. All of the provisions of the Civil Service Reform Act, the Privacy Act, all of the grievance procedures and appeals rights that are available to the Federal employee are preserved in this program.

Mr. **Sikorski.** That's all well and good, and I appreciate that, and I don't underestimate the work that you have had to do and the accomplishment of moving every kind of agency, from the very large to the very small, to the favorite, to the not so favored, in one direction. But the GAO commented that they couldn't get an analysis out of you guys that addressed the rationales for the differences that do exist.

Let me just quote:

> The differences among agencies might be explained by the need for agency heads to exercise discretion in tailoring their agencies' plans to meet specific needs. However, the HHS analysis of the plans did not address the rationales for the differences, and thus we could not examine them.

So you have those who credit the agency heads and their people with making wise decisions and those who suggest that they may be unwise and yet have no basis to judge the differences.

Mr. **Walsh**. Each and every position that has been identified as a testing designated position had a justification written for it. In the review of each of the agency plans which was accomplished initially through the Interagency Coordinating Group, chaired by my office, we asked the Department of Justice and the Office of Personnel Management and my staff, as they reviewed each and every one of these position descriptions and justifications, to be cognizant that the decision for that job being in the pool was reserved to the discretion of the agency head. However, if the justification wasn't clear to each and every member of the reviewing staff, then the justification was sent back to the agency, and the agency was told, "Either delete this position or reclarify and rejustify the position."

Mr. **Sikorski**. "Unclear" meaning there wasn't a justification for it?

Mr. **Walsh**. The justification was not apparent.

Mr. **Sikorski**. If the space management specialist at the Department of Justice is going to be tested because unwise space usage determination could result in a rental of excess office space, that's okay?

Mr. **Mangel**. Congressman, I think that there is a fundamental misunderstanding of the kind of uniformity that the——

Mr. **Sikorski**. Well, let's not get into fundamental questions. GAO made a complaint. Their complaint is, "The HHS analysis of the plans did not address the rationales for the differences between who gets tested and who doesn't, and thus we could not examine them." Is that a fair analysis?

Mr. **Mangel**. No, it's not.

Mr. **Sikorski**. Then can you provide the GAO with your analysis?

Mr. **Mangel**. Yes, and I will provide you with it right now, to an extent.

Mr. **Sikorski**. Well, are you suggesting that you can tell me the differences in that pile of paper over there?

Mr. **Mangel**. No. What I'm suggesting is that perhaps I can explain to you the reason that there are differences, and that might be important.

Mr. **Sikorski**. No. We are talking on two different levels. You can give the universal answer, and we'd like to hear it, but they have raised what seems to me to be a legitimate question about how the differences between similarly situated employees of the Federal Government are going to be treated in this testing process; everything from whether they are going to be tested in the first place, what drugs they will be tested for, and so forth. They say your analysis of the plans does not address the rationales for the differences that occur between agencies.

Mr. WALSH. In the report to Congress, that is correct. The statute did not require us to deal with the rationale. We provided the Congress with the decision guide that we gave to the agencies upon which those decisions were made, recognizing that I think it is unfair to compare a job title of "secretary" from one agency to the other without looking at the responsibilities that the incumbent of that particular position has, and that is what we asked the agency heads to do.

There was really no way in which we could know what a secretary, for example, in the Department of State does. We certainly could not know that better than that individual's branch chief or division director, and that is what we asked the agencies to do. That is on a case-by-case basis, to go through each of their positions and to determine whether or not there were sufficient controls over the position, whether or not there were a whole series of applicable exclusionary provisions which would exclude that individual from the pool.

That is the way the decision guide we gave to the agencies is written. You start with a pool of people that are designated as critical and sensitive under the OPM more general personnel guidelines, and from that critical and sensitive pool you tailor down to the most minimal number, and basically the guidance we gave the agencies starting out in this process, last fall, was, "Only include those people that you feel that your agency would be considered negligent if they did not ensure that incumbents of those positions were free of the effects of illegal drugs at all times."

Mr. SIKORSKI. Mr. Mangel, you had an answer for us, and we want to hear it. I want to know why GAO came to the conclusion that a uniform set of testing criteria will not be applied to the Federal work force.

Mr. MANGEL. I guess I would say that they might have been concentrating on the wrong ball. It does seem to me that uniformity is not a concept that one can determine, irrespective of the axis along which you are seeking uniformity. So something that might be uniform in one way might produce what appear to be un-uniform results.

So, for example, if we were to seek the kind of uniformity that it seems that GAO is focusing on—that is, an identity of job descriptions—we might produce results which would leave you with uniform descriptions of people who are subject to drug testing but totally irrelevant to one of the underlying missions of the program, which is to identify sensitive positions.

So it was decided early on not to seek to create an identity of job descriptions but to provide the agencies with a formula, a formula on which they should be concentrating when looking at each job.

Now as is the case whenever you apply a formula, the answer you are going to get at the other end of the formula depends upon the information that you feed into the formula, and obviously the information that was fed into the formula was going to vary from agency to agency, and, as was pointed out, a GS-10 secretary at CIA may have more sensitive duties than a GS-10 or -11 secretary at the Interior Department or OPM. So you get those kinds of diverse results.

I don't think, though, that it is fair to say that because you get those diverse results there is a lack of uniformity in a significant way in the program.

Mr. SIKORSKI. That is a very small part of their concern on the uniformity issues which arises from a concern of Congress that Federal employees be treated as fairly as possible. Uniformity is one of the criteria by which fairness is arrived at or analysis is made.

Yes, job description was one of the things the GAO focused on, and they commented that that varies. A clerk-typist in one agency isn't going to be tested while a clerk-typist in another agency is going to be tested.

They also saw that there were variances in percentages of employees tested within an agency. At one agency, there will be 1 percent, and at another there will be 100 percent tested. I suppose there are reasons for this rationale.

The frequency at which a TDP employee at one agency who is in the pool will be tested differs from the frequency of testing at another agency. In the area of applicant testing: in some agencies, applicants for these TDP's are going to be tested; at others, they are not, they are just going to be put in the pool.

Post-accident testing and follow-up testing also are not uniform. A clerk-typist in one agency who is in the pool that has a 25 percent chance of being tapped on the shoulder, and another clerk-typist in the TDP pool who has a 25 percent chance in another agency, will not have the same follow-up testing. This was focused on.

The period of time that employees are subject to this follow-up testing and the frequency with which employees will be tested during this period show significant differences as well. Employees within the same agency could also be subject to different rates of follow-up testing; this is within agencies. Applicants and employees under some plans will be screened for fewer drugs than in other agencies.

Their response, when they were asked for the rationale supporting these differences, was that they didn't have it.

Mr. MANGEL. I guess I would ask, whom did they ask for the rationale?

Mr. SIKORSKI. It is in the 4,500 pages, I suppose, their analysis is there.

Mr. MANGEL. I'm not aware that they asked us.

Mr. SIKORSKI. The testimony you provided us was that this was left up to the discretion of the agency, and that if it wasn't clear what the justification was, it was sent back.

Tell me the justification for the space management specialist at the Department of Justice.

Mr. WALSH. I can't really answer that until I look at it within the plan. I understand what you have read there, but I would have to look at it within the context of the plan to determine if there were other justifications. The way in which those jobs were justified was usually done within the context of several positions.

Mr. SIKORSKI. Let's focus on the number of drugs. Why is HHS' guideline saying we should test for five drugs—and I know you saw this question coming for months now. Why do the guidelines focus on five drugs—what are they? Opiates, amphetamines, cocaine, marijuana, and——

Mr. Walsh. PCP.

Mr. Sikorski [continuing]. PCP, and most of the agencies test for those five, but HHS tests for cocaine and marijuana, period.

Mr. Walsh. The guidelines authorized that agencies may test for those five drugs, and we have specified the types of assays that must be used and the cut-off levels for those particular assays.

Within the medical community, there is concern about targeting testing to the prevalence of drug use. Marijuana and cocaine are the most prevalent—by all surveys, the most prevalent drugs of abuse in this country. Therefore, we required agencies to test for those specific drugs. That is where you get your maximum bang for your bucks in terms of the testing program. As you may be aware, for each additional class of drugs that are going to be tested for, there is an additional cost.

The prevalence of drugs is a very interesting phenomenon geographically around the country. For example, here in the Washington and Baltimore area, we have a very significant PCP problem which we don't see anywhere else in the country, except in the L.A. area. In the New Orleans area, for example, several years ago, there was a problem with a combination of pentazocine and Talwin, in which local heroin addicts, since there was a shortage of heroin in that area, found that if they used those two drugs together, in combination, they could achieve a similar kind of euphoric feeling as they got with heroin. We never saw a problem with that combination anywhere else in the country but in New Orleans.

Several years ago in the Florida area, we had a tremendous problem with Quaaludes, methaqualone. In Florida, the State legislature fixed that problem by moving that drug to Schedule 1, prohibiting its sale in the State of Florida. So we have these local areas of specific drug use.

Across the country, the five drugs that we have authorized for testing are the most prevalent drugs we see. Southern California has a significant amphetamine problem, methamphetamine, crystal meth, a variety of amphetamine like drugs referred to as speed.

Therefore the Department authorized the five most prevalent drugs, and we instructed the agencies, "To examine the problem that is generic in those geographical areas where you have the largest segment of your work force, and you may wish, in certain areas, to add additional drugs to your battery that you might not test for in your headquarters area."

Frankly, in my position as the chairman of the Interagency Coordinating Committee and the lead role for reviewing these plans, we treated HHS the same way we treated every other agency. They came in with a proposal; we reviewed it to see whether it met the Executive Order, to see whether it met the provisions of the act, to see whether it complied with the mandatory guidelines; and, if it did so, then it was recommended for certification.

Mr. Sikorski. Who made the decision in HHS to test for two drugs and not five?

Mr. Mangel. Ultimately, that decision is made by the Secretary.

Mr. Sikorski. How many Health and Human Services employees are in the D.C. area?

Mr. **Walsh**. I don't know the answer to that question. We have a large Social Security Administration in Baltimore; we have ten regional Public Health Service——

Mr. **Sikorski**. If my memory serves me right, a good chunk of HHS employees are in the D.C. area. Certainly, there are several thousand.

You just told me that PCP is prevalent in L.A. and the D.C. area. But that is not being tested for. So I heard your answer, but I don't understand why it relates to the HHS decision.

Mr. **Walsh**. Because I think the data was reviewed that in testing for those drugs, for marijuana and cocaine—most drug abusers are poly-drug abusers—they felt that they would pick up PCP users who, quite often, use PCP——

Mr. **Sikorski**. Is the Department of Agriculture going to be any different than HHS?

Mr. **Walsh**. I'd have to look at the plan to determine.

Mr. **Sikorski**. I don't sense that there will be a lot of USDA people using PCP or opiates or amphetamines any more than HHS.

This raises the uniformity issue again and the fairness issue, with regard to how much liability an employee of one agency incurs because of this random drug testing proposal.

Mr. **Walsh**. Let me take a step back in a more global sense. Obviously, this is a very large, a very complex, technically difficult problem. We are trying to balance a set of competing issues and values. On the one hand, the Government is trying to provide a healthy and safe work place for all its employees. It is trying to protect the public in health and safety, national security kinds of issues. It is trying to provide the best service that we can to the taxpayer, and we are also trying to protect the taxpayer from losses due to substance abuse.

On the other side of the equation, we have got a lot of loyal, trustworthy employees who, for the most part, are not into substance abuse. We have employees who have reasonable expectations——

Mr. **Sikorski**. Ninety-five to ninety-nine percent, apparently.

Mr. **Walsh**. We have employees who have reasonable expectations of privacy and confidentiality, and we, personally, as a long-term career civil servant, are trying very, very hard to balance these issues.

We have put together a large, complex program covering, as was said earlier, nearly two million employees in this Tier I. We have demanded as much uniformity and consistency as we could from the agencies. We have required the agencies to build into these programs supervisory training and employee education.

I am delighted to tell you that most all of the agencies in Tier I have committed in their plans to open up their employee assistance programs to the spouse and family members of the employees.

Mr. **Sikorski**. I understand your sensitivity, but tell me in that global answer where I, as an employee of almost all of the agencies, can take your guidelines that test for four or five drugs in a testing designated position, can feel better about my potential for false positives on those three other drugs than the employee of HHS who is similarly situated in a TDP but doesn't——

Mr. **Walsh**. If you use drugs, you should be very concerned about this program. I don't think there should be any concern about false positives in this system. We have built in a system which is so rigid, is so—there are so many——

Mr. **Sikorski**. We are going to get into that. But even if they believe that the system isn't going to err, that this is a perfect, though human, system with absolutely no errors, there still is a reticence and apprehension among any employees who are going to get drug tested. Call it original sin, call it guilt that has been bred into us, but people are afraid of a test.

Mr. **Walsh**. Where I was trying to go, kind of leading in on this sort of global approach, is the fact that we recognize that there are going to be some problems with the system. We have tried to build in safeguards, for example, on the TDP assignment. We have built in the safeguard that any employee who is in a testing designated position can appeal that.

Mr. **Sikorski**. To whom?

Mr. **Walsh**. In each of the agencies, it is specified as to who the individual——

Mr. **Sikorski**. Not yet though for many of those that have been certified by you. There are many agencies that haven't designated the——

Mr. **Walsh**. I would argue that that is not true. It may not be clear in the GAO analysis.

Mr. **Sikorski**. The OPM director just testified that that was true, that there are agencies that haven't designated the people that are going to hear these appeals for these TDP's.

Mr. **Walsh**. There are, despite what the GAO indicated in their testimony, reporting—statistical reporting requirements—and this gets to the oversight issue—on a semi-annual basis to the Department of Health and Human Services, basically to my office. All agencies will collect, compile, and report anonymous statistical data on the number of tests, random tests conducted, the number of reasonable suspicion tests, follow-up tests, applicant tests, and so on, the number of verified positive results, involuntary and voluntary counseling referrals, terminations or denial of employment resulting from refusing to submit to testing, terminations or denial of employment offers resulting from alteration of specimens, termination or denial of employment resulting from failure to complete a drug abuse counseling program, and also the number of employees who successfully complete the program.

I really want to assure you, there is going to be continuous evaluation and tweaking of this system. As I said, we are beginning a very large program. We have to recognize that, especially in the first year, in the initial phases of getting this up and running, as the agencies begin to get experience, we will have continuous feedback, very, very close monitoring on a weekly basis of the laboratory program, but the agencies also will be compiling this data for HHS on a semi-annual basis and will report to the Congress on an annual basis in compliance with the provisions of the act.

Mr. **Sikorski**. I thank you for that answer on the statistics. I think it is important and it is good and it saves asking that question. But the question is, there are four agencies that we are aware of—yours, HUD, the Savings Bond Division of Treasury, and the

Bureau of Public Debt in the Treasury—that test for less than five drugs. The Bureau of Public Debt in the Treasury tests for four. The Savings Bond Division of the Treasury, HUD, and HHS test for only two. I haven't heard the rationale for testing for only two, and that is exactly what GAO said was missing in its review.

I'm not so sure you are wrong, but I don't understand why your recommendation to others—and they picked it up as almost boilerplate—is to test for five drugs. It raises fairness issues between civil servants who are similarly situated.

Looking at lab requirements, if testing starts in August, are there going to be any private labs ready to test?

Mr. WALSH. I'm sorry, I guess I don't understand the fairness issue of whether an individual——

Mr. SIKORSKI. The fairness issue is pretty obvious, and the fact that you refuse to recognize that raises questions about the oversight of this program to reach the uniformity that was established in the supplemental appropriations legislation and calls into question your general waivers of non-uniformity here.

Mr. MANGEL. I don't think that Dr. Walsh intended to say that he didn't think fairness was important. I think he said he didn't understand the point you were making.

Mr. SIKORSKI. And that is the point I am responding to.

I understood fully what he said, and I heard what he said.

Mr. MANGEL. No. He was talking to me at the time, so he didn't hear what you said about fairness, so he was asking you to——

Mr. SIKORSKI. Oh, I'm sorry. I'm sorry.

You didn't hear me?

Mr. WALSH. That's correct. I'm sorry.

Mr. SIKORSKI. You weren't talking to him at the time, you were listening to me, and then afterwards I asked the question about lab testing procedures. So let me state again: Your unwillingness to recognize how an employee in one agency who is going to be tested for five drugs feels about his or her potential liability compared to the employee of HHS which follows the guidelines but is only going to test for two drugs, raises for me a question of the credibility of the general statements you have made that you have searched for and you have found uniformity in this massive program. That is my comment.

Then I asked the question focusing on lab requirements. If testing starts in August, are there going to be any private labs ready to handle these tests?

Mr. WALSH. There are over 100 labs currently going through the certification process. We anticipate they will all be finished with the process by mid-August, and we will release a list of those who are certified in September. In the interim, most of the agencies who anticipate testing before that time have developed interagency agreements to use the Department of Defense labs. The Department of Defense has agreed to make available the resources of their in-house laboratory capability, for the interim period until sufficient certified laboratories are available.

Mr. SIKORSKI. Are there any private labs currently certified?

Mr. WALSH. The Department of Defense has two private laboratories which are currently certified.

Mr. SIKORSKI. What kind of numbers can they handle?

Mr. Walsh. The individual private certified laboratories?

Mr. Sikorski. Yes.

Mr. Walsh. Probably somewhere in the neighborhood of a quarter of a million to half a million specimens a year each.

Mr. Sikorski. Okay. And when these 100 or so labs are on line, what numbers can they handle?

Mr. Walsh. I think the capability will far exceed the demand.

Mr. Sikorski. The scientific and technical guidelines state that written procedures will be promulgated for instances when lab systems are out of acceptable limits or errors are detected. When will these procedures be issued?

Mr. Walsh. The procedures for the certification process are spelled out in section 3.19, in the guidelines. There are three levels of quality control built into the system. First, there is bi-monthly proficiency testing where the lab must meet five different standards. That is really only one aspect of the quality control.

Second, the agencies are required in their contracts to have contract laboratories which have internal quality control programs where 10 percent of all specimens processed must be internal quality control standards and blind control standards.

In addition, the third level of quality control in the overall program is that the agencies themselves must send what we call blind quality control specimens—specimens that are packaged exactly the same way as an employee's, the same kind of label, and so forth. During the first 3 months of the program, 50 percent of the specimens that they send to a lab must be quality control specimens. After the first 90 days of the program, it drops to 10 percent.

Mr. Sikorski. So that the first three months of a program—is this on an agency-by-agency basis?

Mr. Walsh. Correct.

Mr. Sikorski. So from all of the HHS samples—half of those samples are going to be test samples to check on the accuracy of the lab.

Mr. Walsh. That is correct. And 80 percent of those test samples will be certified as blank, having no drug, to maximize the probability of picking up any laboratory——

Mr. Sikorski. False positives.

Mr. Walsh. That is correct.

Mr. Sikorski. And then, after three months, that will drop down to a continuous 10 percent sample.

Mr. Walsh. That is correct.

Mr. Sikorski. Will the proportion be similar, 80 percent there and those 10 percent?

Mr. Walsh. That is correct.

Mr. Sikorski. So if human behavior picks up and understands these public figures, the error is to find no drug in the urine.

Mr. Walsh. That is correct.

Mr. Sikorski. Okay.

Mr. Walsh. However, every other month the lab will be tested through the certification program, where they must correctly identify drugs that are coming through in test samples, not only identify whether they are there or not, but they must precisely be able to identify the quantity of drug that is present.

I might add that a single false positive coming out of the laboratory is grounds for disqualification during the initial certification process and is immediate grounds for suspension and perhaps revocation of certification based upon an investigation by a team from my office.

Mr. SIKORSKI. Thank you.

Let's look at testing the tester. The issue we raised last year concerns the fact that the guidelines said nothing about qualifications or expertise of collection site personnel, the issue that Mr. Gilman raised earlier with Director Horner. Again, the new guidelines do not say anything about the qualifications of collection site personnel or that they be drug-free themselves should they be tested.

Isn't it important that individuals collecting urine are properly trained so that they don't contaminate or break the chain of custody and the rest. How would their competence and objectivity be assessed?

Mr. WALSH. I agree wholeheartedly that is a critical issue. We are developing a training program for specimen collectors and a specimen collection manual.

At the present time, the Department of Health and Human Services is negotiating a contract to do specimen collection, which I believe 22 other Federal agencies are piggy-backing on this contract which will probably provide collection services for most of the agencies.

Mr. SIKORSKI. Are these collectors going to get randomly tested?

Mr. WALSH. Yes, they are. That is a stated part of the contract, a requirement of the contract, that those individuals be tested.

Mr. SIKORSKI. The gentleman from New York also raised the issue of unusual behavior. The guidelines say, "The collection site person shall note any unusual behavior or appearance in the permanent record book." What is normal? Usual? What is unusual?

Mr. WALSH. I think we did respond to that in the preamble of the final guidelines. That was an issue that was raised earlier. Certainly if a condom full of someone else's urine rolls out from underneath the door of a stall, that would constitute unusual behavior. I think it would be very difficult for us to specify all of the potential unusual behavior that might occur, and the fact that it is recorded in the record book is simply as information for the medical review officer to go back and review should a confirmed positive result occur down the line.

Mr. SIKORSKI. I didn't completely follow. Are you suggesting examples in your manual, or are you leaving it up to the discretion of these collection site people? And what are these people going to get paid?

Mr. WALSH. I have no idea what they would be paid. Our position was that in writing the guidelines, that we could not foresee or define every contingency that might occur that would create suspicion that an individual was adulterating or tampering with a specimen.

In each of the agency plans, we require the agencies to have second level authorization so that a specimen collector, on their own recognizance, could not initiate any kind of adverse action against the employee, that he would refer to a higher level supervisor for direction and guidance.

Mr. SIKORSKI. Should not that language be something like "behavior suggesting fraud"? Go ahead.

Mr. WALSH. I'm sorry, I didn't hear that.

Mr. SIKORSKI. Go ahead.

Mr. MANGEL. I was going to point out to Mike, but I'll do it directly, that the model plan, to the extent that we tried to get into this the question of suspicious behavior, does make an attempt to provide some examples, and if you look at page 32 of the model plans that have been supplied, now granted, it still leaves a good deal of discretion to the collection site personnel, but we have made some attempt at providing guidance.

Mr. SIKORSKI. You know, unusual behavior, you suggested that is suspicious behavior. Being a person who is in the public all the time, I'm not so sure that unusual behavior is suspicious at all. I mean human behavior ranges from a whole gamut and can be very innocent.

Mr. MANGEL. Sure, but we must remember the context within which we are operating and relate unusual behavior back to the context that we are talking about.

Mr. SIKORSKI. You should just consider that the language pick up the suggestion of fraud, because that is what we are trying to deal with. We are trying to deal with a urine sample that is the real urine sample.

Mr. WALSH. What we are really trying to do here is to balance the requirements of the program to obtain a specimen that is integral to the program, that we must ensure the integrity of the specimen, that it did, in fact, come from the individual, while trying to balance the employee's reasonable expectations of privacy and confidentiality.

The President has ordered in the Executive Order that the specimen not be witnessed and that the individual be allowed to provide a specimen in privacy. In order to do that, we have made some procedural requirements in here to ensure the integrity of the specimen.

Mr. SIKORSKI. Mr. Mangel suggested the language on page 32. It doesn't give examples. However, it does direct the eye to behavior that is attempting to alter or——

Mr. MANGEL. It does give some examples. For example, if the specimen has a temperature that is not——

Mr. SIKORSKI. Right. The behavior you are focusing on there is towards alteration or the fraudulent sample.

Mr. MANGEL. Yes.

Mr. SIKORSKI. Two last questions. The gentleman from New York raised the sample splitting question. The guidelines do not require sample splitting, which is necessary to protect against lab contamination mistakes, as some suggest. In his testimony on April 29 this year before the Senate Appropriations Subcommittee on Health and Human Services, Education, and Related Agencies, Secretary Bowen said, "I think that it, sample splitting, is a necessity, and, yes, I think that is something that is sort of taken for granted." Further, the language in the supplemental appropriations last year states that the best technology and techniques available should be used. Yet in the comments to the scientific and technical guidelines published April 11 of this year, HHS responded that it was too costly and not worth the additional cost.

Is sample splitting not included in the guidelines due to its cost?

Mr. WALSH. Absolutely not.

Mr. SIKORSKI. Okay.

Mr. WALSH. The guidelines do not require agencies to split samples.

I think one of the issues here is trying to get an accurate definition of what constitutes a split sample. A variety of split sampling proposals have been made, some of which meet the spirit and intent of the guidelines, some of which do not. For example, there was a proposal that the employee be allowed to retain half of the sample at his home, and, at some time in the future, should a question occur about the other specimen, that they could bring it in. That would certainly not meet with the guidelines.

In reviewing the agency plans, we did approve in two agencies' plans split sampling procedures. I think we have certainly encouraged that. As I said, we have this network of principal liaisons from the agencies who communicate with us on a daily basis as to what would constitute an appropriate and approvable plan.

Mr. SIKORSKI. You are comfortable with that split sample policy, in light of the best technology language in the supplemental appropriations?

Mr. WALSH. Yes, I am.

Mr. SIKORSKI. Okay. The Office of Workplace Initiatives, your home, in the National Institute of Drug Abuse has been funded through the salaries and expenses account of NIDA, as I understand. Since the office has such an important mission, don't you think it merits its own line item in the administration's budget?

Mr. WALSH. I think there are various proposals at this point for subsequent funding. Some of the activities were proposed to be reimbursed by the other agencies, and there is a proposal to do that. I think there may be some language that has been included within the overall HHS appropriation. I am basically a scientist in a research institute, and these budget questions are certainly at a far higher level than I am usually privy to.

Mr. SIKORSKI. I can understand your reluctance. It just seems to me that if this is that important and it is leading to the expenditure of hundreds of millions of dollars, affecting the lives, reputations, and careers of hundreds of thousands of people, that at least we could have the Office of Workplace Initiatives, which has been attempting to deal with the practical, scientific, and technical aspects of this, with its own line item so that it doesn't have to get paid out of expense accounts and creative accounting.

Finally, as the main author of this program, is the Government ready to test in accordance with the law, or should the Office of Personnel Management, the Health and Human Services, and other agencies responsible for this program address some of the concerns raised today?

Mr. WALSH. I very strongly believe that we have made an extraordinary effort to comply with the spirit, the intent, and the letter of the law, that I have never seen in my almost 23 years of Government such a thorough, thoughtful, and exhaustive review made. It has been a very interesting experience for me in dealing with all of these different agencies of Federal Government, large and small. They are very, very different. It is almost as if they attract different kinds of personalities and people. I am sure you are aware, each and every one of them have their own way of doing things.

However, in coming together and bringing them together in dealing with this very, very difficult problem, I think there was a spirit of camaraderie that has evolved in trying to make this more than simply a drug testing program. I almost cringe when I hear people refer to it as drug testing plans.

I think we, between the Office of Personnel Management, the Department of Justice, and HHS, in terms of pursuing these efforts, have been able to get agencies to commit resources, people and dollars to a much broader program than simply drug testing.

I think the supervisory training program will have great benefits in terms of—for example, all agencies are required by law to have employee assistance programs, but I think for the most part Federal managers have no idea of how to get a problem employee from their office into that program. I think as a spin-off from this drug-free workplace program there will be significant training in terms of supervisors being better managers, being better able to recognize problems at an earlier stage in the game, and getting the substance-abusing employee, whether it be alcohol or drugs, into the employee assistance program.

I think the employee education component of these programs is going to do a great deal in terms of sending a message, and I think that is what the President really intended in terms of getting this program off the ground, to begin to send a message that substance abuse is an unacceptable behavior in our society. I think for the last 20 years we have been sending a lot of mixed messages, that maybe it is okay to do it on your own time, on the weekend, but you can't do it on the job. I think it is a very difficult line for a lot of people to understand.

Mr. SIKORSKI. What about alcohol abuse? You have told the subcommittee that alcohol abuse has a much broader and greater monetary and personnel impact than what we are talking about for these illegal drugs.

Mr. WALSH. As I said earlier in my testimony, the testing component is a very small part of the overall program. All of the other components target alcohol as well as the illicit drugs, and I think within this program we will give new emphasis to say to managers, "It's all right for you to take action and get an employee who has an alcohol problem into the employee assistance programs, begin to make requirements on that employee."

I think if we could set that kind of a tone through our Federal work place—and I think we are going to take this whole program and move it to the private sector through Federal contractors and others, as we saw last week the meeting that Mr. Gilman mentioned of a corporate initiative for a drug-free work place, the same kind of procedures. In fact, most corporations are using the procedures that we have set out in our technical and scientific guidelines for their programs as well.

Mr. SIKORSKI. I just worry about the hundreds of millions of dollars being spent on the technical aspects of testing, urinalysis, and the so-called Helping Hand Program being the poor cousin, which you are putting a lot of faith in, and I join with you in embracing that spirit.

Again, the subcommittees are indebted to you, both you, Mr. Mangel and Dr. Walsh, for your sharing with us of your talents and time and look forward to continue working with you as we go through this process.

Mr. WALSH. Thank you very much.

Mr. MANGEL. Thank you.

Mr. SIKORSKI. Thank you. We are going to see how that camaraderie holds up that you talked about with the next panel here, kind of the other side.

The next panel consists of Lois Williams, director of litigation for the National Treasury Employees Union; Mark Roth, general counsel for the American Federation of Government Employees, AFGE; and Beth Moten, director of legislation for the National Federation of Federal Employees, NFFE. All three have worked tirelessly to analyze and improve the drug testing program, the challenged aspects of it in court.

Welcome, all of you. We have an extra person. Who is that?

Ms. MOTEN. Bruce Heppen, deputy general counsel for NFFE.

Mr. SIKORSKI. Welcome.

Mr. HEPPEN. Thank you.

Mr. SIKORSKI. Lois, why don't you begin, since you are first on my list. I don't know if there was anything else arranged. If not, you may begin your testimony. It will be put in the record as you want it, either written or quickly written soon after this hearing, and that will be part of the record. Your use of your time is up to you.

STATEMENT OF LOIS WILLIAMS, DIRECTOR OF LITIGATION, NATIONAL TREASURY EMPLOYEES UNION

Ms. WILLIAMS. Thank you, Mr. Chairman. Thank you for the opportunity to appear today.

Mr. SIKORSKI. I would suggest, and I think you were going to do this, but it would be helpful to hear a response to questions that were raised by members of the subcommittees based on your testimony and how you heard those responses.

Ms. WILLIAMS. I'll do the best I can with that. I had made some notes as we went along. The problem with this issue is, where can we begin? There are so many things one would like to respond to in so little time. This is obviously not the time to catalogue all of our objections to the program, be they legal, constitutional, practical, and every other objection.

Mrs. Horner spoke of the consensus that has developed and has taken a while to develop. Obviously, we believe we are a long way from consensus, and I would like to note at the outset that she mentioned the judicial branch. It is difficult for us to see how they can go ahead with this program given the fact that the Supreme Court has agreed to hear our challenge to one of these programs, and we will have some resolution, we think probably almost total resolution, of this issue by the Supreme Court this term. The courts are certainly divided on it, but there are obviously in everyone's mind very grave constitutional questions.

I will also say that when you talk about consensus, there are a lot of managers in this town that are praying for the unions' efforts here. They don't have anybody to represent them. They come to us, in fact, asking us if we can file suit on their behalf which, of course, we simply don't have the resources to be able to do, even though this is one situation where management and the union have very similar interests frequently.

There has been much discussion about the costs and the numbers we are likely to turn up. Let me just say that our experience is, with the program where we represent employees, the Customs Service, that has been going ahead, the commissioner has testified that out of 3,663 tests there have been 5 positives—5 positives. That amounts to .001365 percent. That makes us better than 99.99 percent pure, as far as I am concerned. It is not totally representative, so I don't mean to suggest that that is the way it is always going to turn out, but the highest estimate we have heard, as you have mentioned, is 5 percent.

Now that has an impact on the cost question, and I want to say that we mustn't forget that one reason it is so expensive here, as the chairman has alluded to, is that we have to test 95, 99, 100 innocent people in order to find that 1 positive, and that cost has to be factored in here.

The other thing about costs that I have not seen estimated anywhere is the taxpayer costs spent so far and the future taxpayer costs that will have to be spent in defending these programs in court. It is not an insignificant amount. I know it has cost us a lot of money, and the litigation, if this program continues, is only just beginning.

One other thing I'd like to say about the wisdom of this has to do with a very basic principle of our society, and that is that it helps sometimes to remember why we have a fourth amendment to the Constitution, and it fits very appropriately in this discussion. The colonists just had enough of widespread searching of innocent people, their homes and their persons, by the Government, and the judgment was made that in this society the Government's intrusion on privacy is supposed to be limited to and concentrated on those who are probably guilty. That is why we have a probable cause requirement in our Constitution. Those most likely to be guilty are the ones who will suffer the intrusions of the Government. In this program we have in overwhelming numbers those most certainly innocent who are being searched.

I simply put to the subcommittees why, only in this situation, are we so ready to forget the intent of the framers?

One final word on this general question. The Attorney General spoke recently to the mayors of this country and urged them, if they haven't done so already, to set up programs for testing their own employees, and the mayors, if the public reports are to be believed, rose up and said: "Be serious. Our streets are on fire, our children are threatened, drug-related crime is rampant, and you are telling us that it's our employees we have to be worried about, that we have to focus our energies on those employees? That's a totally misguided effort." And that, of course, is our point, misguided policy, misguided effort.

On to the questions of fairness, uniformity, compliance with the law. The chairman has asked who is in charge and, obviously, has yet to get a very clear answer. I think it is also clear that a number of agency heads are pretty reluctant dragons in this effort, and I think they are to be commended for that.

It would be very easy to achieve uniformity by making testing more widespread, but that would be an irrational, a stupid answer to this problem. That would achieve uniformity. It would be like saying for a violation of the Equal Pay Act we should reduce men's wages and we will, therefore, achieve equal pay. Obviously, we would.

Now the Congress has attempted to ensure some uniformity and fairness, but obviously there isn't any mechanism for it in this program. The director of OPM said in fairly strong terms today that she has done what she can to require that. I must tell you from my vantage point, her lawyers have gone to court with the contrary argument and have said, "We're giving just guidance; the agencies are free to do whatever they want." This is in aid of a different argument, which is that they shouldn't be held to the requirements of the Administrative Procedures Act for publishing their requirements for notice and comment.

So I think it is not clear even from that agency's point of view how much power they have or are willing to exert or are willing to admit they exert in this effort at fairness.

It is equally clear that HHS did not, and really could not, take account of some of these concerns, and for all of the certification that law is being complied with, the Department has no particular expertise in the Civil Service Reform Act, it doesn't have any responsibility for its enforcement and, as far as I can tell, took no cognizance of some of the questions that have been raised today regarding the requirements of that act. Let me just mention them. I won't detail them; they are detailed in my testimony. I would like for that to appear in the record, Mr. Chairman. It is, obviously, too lengthy to read, and I am just trying to hit some high points today.

Our critical problem with the Civil Service Reform Act requirements is the nexus question, as you have suggested. But let me say it's more than just the fact that to take adverse action an agency has to prove nexus in every single case. That is true. That is the requirement of the law. That stands no matter what these programs come up with. There is nothing to supersede that requirement.

It is not true, as was suggested, that the MSPB has already decided this question for all Federal employees, obviously. It has said that in a particular context the nexus exists. We do not suggest that there is never a nexus between drug use and Federal employment. That would be a stupid position for us to take.

Mr. SIKORSKI. MSPB is the Merit Systems Personnel Board—Merit Systems Protection Board—right?

Ms. WILLIAMS. It's probably a Freudian slip to skip "protection." Yes, it is, the Merit Systems Protection Board.

Mr. SIKORSKI. Someone who isn't informed of that might be reading this some day, and it has been used before, and it has never been defined.

Ms. WILLIAMS. That's right. I beg your pardon, Mr. Chairman. Thank you very much. It is the body that decides questions of law regarding adverse actions taken against employees.

Of course, I should say if you happen to be innocent and you simply have to undergo this humiliation and nobody ever has any reason to take any adverse action against you, you have, obviously, no remedy in any of these various forums that were spoken of. The only thing you can do is appeal—as you have suggested, there are faults with that—ahead of time the designation of your position.

Now I don't see anywhere any protection that you would not be tested in the meantime. That was suggested this morning, but I don't think that is at all guaranteed. Nevertheless, I meant to say that the Merit Systems Protection Board has not made any broad ruling, but it obviously depends on the agency, the job, and so on, and the Congress has made a very carefully considered decision years ago in this statute that even criminal activity, which nobody would argue is consistent with Federal employment, is not automatically grounds for disciplining a Federal employee; it just isn't. That determination was that this should be left to the criminal justice system and that, except where a clear nexus is shown, proved in that particular case, and we have seen cases where shoplifters and other crimes have been ruled not grounds for termination. Unless the agency can prove nexus, there is not any grounds for discipline.

Now the other important thing that I don't think has been said about nexus is—this is part of our constitutional argument, which is why I want to remind you that there is a constitutional question; I know you don't forget that. But what the agencies have done is obviously required by the Executive Order, and that is where the legal infirmity lies. They have made the presumption that a nexus exists between any drug use and Federal employment. They have made that presumption, which we say is illegal under the statute, which I think is clearly illegal under the statute. Then they use that illegal presumption to justify the searches in the first place, and then they say, "Well, if action is taken against you, you can always raise that nexus question in subsequent litigation." See what a circular, absurd argument that is.

So it violates, in our opinion, both the letter of the law and the spirit that suggests that that nexus must exist and not be presumed. And the last thing I will say about that is, I think it is extremely disingenuous for administration officials to appear today and make that kind of an argument about nexus since the President, when he issued his Executive Order, also asked for legislation that would have written into the Civil Service Reform Act and the Rehabilitation Act those provisions. That has never been enacted into law, and now they simply go ahead and presume that that is the law, that there is automatically a nexus between these two things and that there is no problem with the Rehabilitation Act, which is, of course, the other thing we detail in our testimony.

The intent and the effects of this program, we think, are clearly punitive. That you can see in the way that rehabilitation is treated, and, in that respect, we believe it violates the Rehabilitation Act.

The thing I want to highlight is that if you go into a rehabilitation program, under all of these programs, I believe, without exception, that fact is grounds for future testing at any time. It provides the reasonable suspicion that they need to test you again.

Now some programs, apparently—it is difficult to tell from reading these plans—some of them don't provide for testing during the rehabilitation period—that is, while you are in the program—but for testing immediately after. Others do provide that you may be tested at any time, and as frequently as they wish, while you are in the process of rehabilitation. Our experts tell us that that simply isn't rehabilitation if you are to be considered failing on one relapse while you are in the process. I think if you ask the experts in this area, you will find uniform agreement on that point, and of course there is case law as well that suggests that that is not grounds for termination, one relapse during a rehabilitation effort.

So in that sense, we believe it is very clear that rehabilitation is not the primary aim, as well as what you have suggested, Mr. Chairman, repeatedly, which is that the proof is in the pudding, and the resource allocated to rehabilitation is minuscule compared to what I think is really a law enforcement goal. The aim is really one of law enforcement, it is not an employment aim, it is not a rehabilitation aim.

As to the question of uniformity and rationality, I ask, how can there be, given the Executive Order requiring arbitrariness? I think, where it permitted discretion—where the Executive Order permitted discretion—and there has been much discussion of that this morning—it didn't give any real guidance to how that discretion was to be exercised, and the problem that we see is, once we abandon probable cause, which is well understood in our society, in our jurisprudence, and once we abandon the safety question and we move into areas where the national security rubric may cover a lot of sins and it becomes fairly clear that just having an important job is the problem——

Mr. SIKORSKI. The trust and confidence.

Ms. WILLIAMS. Absolutely, and I cannot overstate how serious a problem that is.

You have focused on some of the things that we mentioned as well, the space management specialist has gotten a lot of play. I think there are other equally silly examples, and I must say, we are not talking here about comparing job titles; we're not comparing a secretary in one agency versus a secretary in another. We are talking about the very rationale they give for testing these people. That is what the agency said. That is what the Justice Department said was the reason to test the space management analyst, because of the possible rental of excess office space.

The secretary-stenographer is another one I would mention in the Antitrust Division of the Justice Department, because there a drug-crazed stenographer might cause higher prices, lower quality of goods and services, and decreased competitiveness for American business in world markets. Now I ask you; the mind that created that justification could justify anything.

Mr. SIKORSKI. I question whether that woman, probably, is being paid with that kind of responsibility on her shoulders on a daily basis.

Ms. WILLIAMS. That is a wonderful question. I would love to have the answer to that.

I was interested when the secretaries alluded to in the previous testimony were said to be GS–10's. There are very few secretaries in this Government that are GS–10's.

The administrative assistant, it was testified, because of improper inventory control; the secretary in the procurement office because of possible inappropriate contract awards; it goes on and on.

I think we can all see when there is an immediate safety concern. I don't even like to use this example because I think there are problems with it as well, but we don't have any problem seeing the difficulty that, when you make a split-second judgment that affects the safety, the lives, of people, it may not be possible to discern whether one is under the influence of drugs, so as to have an impact, an impairment in judgment.

But all of these other examples have to do with people who do important jobs and who make important decisions and the problem if their judgment is impaired. It is a problem if your judgment is impaired; it is a problem if my judgment is impaired. Naturally, it will affect people. But that is not something that can't be observed. That is not something that we have to leave to a urine test. That is something we can see on the job, and that is what managers are paid to see.

The fact that I hold a responsible position—it's not my job specifically to protect managers, but the absurdity of suggesting that a policy-maker, you know, an office person, may have impaired judgment that can't be seen, that has to be detected through a urine test? What sort of management is going on in the Government if that is true? That is an absurd notion, and that happens because we have gotten into areas where judgment, and reliability, and integrity, all unmeasurable, have to be the guiding force.

I think the drug-crazed accountant, lawyer, computer operator, high-level policy-maker are simply an imagined threat, and, stripped away, we see that the aim is really a political statement.

Remember, we are talking about people who are performing well. Otherwise, we would know—we would know that they are not, and we would have taken action against them already. We are talking about people who perform well, and the notion that some hidden thing might affect their judgment is, I think, absurd on its face, except in those very, very, very few situations where it might be difficult to tell in time.

I will not go into, Mr. Chairman, my comments—you have alluded to some of them—on the HHS guidelines, but we detail them fully here, and I think I want to say that it shouldn't be forgotten that we made those comments, many of them verbatim, when the guidelines were published for notice and comment, and that the Department declined, in its final regulations, to say what constituted unusual behavior; it declined to say; it said that it was too difficult to pin that down.

So we did make the comment; it was responded to. It is not something that just came up new.

Mr. SIKORSKI. No. We asked questions on that a year ago.

Ms. WILLIAMS. Yes.

Mr. SIKORSKI. I have just one question for you. Do you have any appreciation of why HHS is testing for two drugs and their guidelines recommend that other agencies pick up five drugs or, in one instance, four drugs?

Ms. WILLIAMS. I think—and we do represent people at HHS—I have no doubt that what Dr. Walsh said is absolutely true, that it has to do with the likely incidence.

I don't think there has been any attempt throughout this program to try to figure out what harm, in fact, occurs. I mean it is unquestionable that marijuana is the most innocuous of all these drugs, and yet it is required that every agency test for marijuana.

I think if we are talking about nexus it will probably be hardest to prove when we are talking about off-duty use of marijuana for some jobs, and yet every agency has to do that. Now that is because the use of marijuana is much more widespread. I believe that that is true. I think they are putting the effort where they are most likely to find positive results.

But I think that the point that the chairman has made is obviously the point to bear in mind, which is that it simply demonstrates that there was no attention to uniform treatment of similarly situated people, and, I would add to that, it is irrational besides. It is irrational besides. We are putting a lot of effort into testing for the most innocuous drug.

The question of alcohol is very intimately related here. Director Horner suggested that a breathalyzer wasn't appropriate, but our research shows that the breathalyzer at least has the advantage of showing that somebody is currently intoxicated. At least you can make some inference that there may be some job impact. You can't do that for any of these drug tests.

Mr. SIKORSKI. It is a lot less invasive of people's sense of privacy or dignity.

Ms. WILLIAMS. Indeed it is, and it is a lot bigger problem to deal with. I mean the whole thing is irrational.

[The statement of Ms. Williams follows:]

STATEMENT OF

LOIS G. WILLIAMS
DIRECTOR OF LITIGATION

OF THE

NATIONAL TREASURY EMPLOYEES UNION

Thank you, Madame Chairwoman, Mr. Chairman, and other distinguished members of the House Subcommittees, for once again permitting me the opportunity to discuss the implementation by the Executive Branch of its program for urine testing of civilian federal employees. My name is Lois G. Williams, Director of Litigation for the National Treasury Employees Union. NTEU is the exclusive representative for approximately 130,000 federal civilian employees located across the continental United States, Alaska, Hawaii, and Puerto Rico.

At the outset, let me reiterate that it is and has always been NTEU's position that random testing of federal employees, without any cause to believe that a particular individual uses drugs, violates the Fourth Amendment as surely as would an Executive Order that required the random searching of an employee's home, personal effects, or correspondence for evidence of criminal conduct. The majority of courts to have ruled on this issue, including two Courts of Appeals, have agreed with our position. And the United States Supreme Court has agreed to hear our challenge to the Customs Service's plan. Yet, in the face of grave questions concerning the constitutionality of its plan, and with a dispositive opinion by the Supreme Court to issue in the not-too-distant future, the Administration pushes on with its plans to search the urine of its employees right now.

Our opposition to this Administration's drug testing program is not a defense for drug use. Indeed, among our members are the employees of the United States Customs Service who have as one of their important duties the interdiction of illegal drugs at our borders. They understand very well the war on drugs; they are in the first line of defense in that war. And if we are not actually losing that war, it is clear that we are far from winning it. One horror story follows another in the newspapers every day on the scourge of drugs, organized crime and drugs, drugs and our children, and the like.

Attorney General Meese and the President propose to wage their war on drugs by attacking the foot soldiers. They propose to spend the taxpayers' money to randomly test the urine of about one-quarter of the federal workforce. They have admitted repeatedly in court that they are embarked on this effort, not because they have any reason to believe that a drug abuse problem exists among federal employees, but because they want to make an example of federal employees, and to deter such abuse from developing. The justification for this program seems to center on safety concerns: the question is usually asked, "how would you like it if the pilot, the air traffic controller, or the railroad engineer who holds your life in his/her hands were high on drugs?" In fact, the vast majority of the positions slated for random testing have nothing to do with immediate concerns for public safety. What the Administration seems primarily concerned about is drug-crazed lawyers, managers, technicians, computer operators, and a host of other employees who have important jobs, but who in no way are in a position to make split-second judgments that will affect life or limb.

Employees of this sort, who have never given their employer any reason to doubt their integrity or their law-abiding nature, are entitled to take umbrage at this program. The closer they come to actually having to undergo the test, the more outraged they become. From the apprehension they feel at the prospect of having their urine captured and analyzed, to the embarrassment of having to urinate on demand in the presence of a monitor, to the outrage they feel at having to divulge to strangers, or to their employer, a broad range of private medical information, urine tests violate reasonable and normal expectations of privacy in our society. As then-Professor Charles Fried so trenchantly put it twenty years ago, commenting on the "symbolic importance" which societies assign to certain "conventionally designated areas of privacy":

> Thus in our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem.

C. Fried, Privacy, 77 Yale L.J. 475, 487 (1968).

Believe me, federal employees are angry and they are offended. They do not understand why they have been singled out to function as political symbols. I invite you to put yourselves in their position: year after year, you receive pay "increases" that give you less take-home pay than the year before; you and your colleagues are demoralized by fed-bashing from all quarters; and you work for a man who, both at home and abroad, blames "bureaucrats" for the world's ills and the people's miseries. Now they demand that you prove you are drug free by meekly submitting to random, unannounced urine tests.

There are a great many federal employees who are deciding that their employer will have to fire them before they will submit to this indignity. And a great many more are considering suing their employers over their drug testing plans, many more than organizations like ours can help. But there are far more who do not have the luxury of either option, and who will simply have to submit.

Occasionally, it is well to remember why we have a Fourth Amendment to the United States Constitution. The Amendment, with its probable cause and warrant requirements, exists to protect the probably innocent. It functions to assure society that the government will direct its intrusive activity toward those who are likely to be guilty, and to avoid random searching of those likely to be innocent. The experience we have so far with the Customs program is that 99.99+% of those tested are innocent.

It is ironic in the extreme that those who profess special fealty to the intentions of the founding fathers are so willing to ignore that clear intent with respect to general searches and seizures without probable cause. It is even stranger that those same persons would forge ahead with this misguided program in the face of two courts of appeals decisions striking down federal employee drug testing programs, and of the Supreme Court's decision to review the issue in the coming term.

I recognize that this program has acquired a certain momentum. It would be naive not to recognize as well that the Administration is pushing to implement as many of these programs as possible in hopes that the courts will find it more difficult to undo these efforts than to stop them aborning. But let us not lose sight of the fact that any tax money spent on a wholly misguided endeavor is money wholly misspent. The Court will speak; but the Congress should speak as well on the wisdom, the fairness, and the lawfulness of the Administration's efforts. Although the Secretary of HHS has certified that agency drug testing plans are in compliance with the conditions specified in the Supplemental Appropriation Act of 1987, we believe that these plans are inconsistent with the letter and the spirit of that law. Therefore, we do not believe that any funds should be expended for the implementation these plans. I turn now to some review on the conformity of the drug testing plans submitted to Congress with last year's Supplemental Appropriations Act; then to the consistency, or lack thereof, between the Administration's programs and the Civil

Service Reform Act and the Rehabilitation Act; and the serious flaws in the testing procedures under the HHS Guidelines.

THE DRUG TESTING PLANS' COMPLIANCE WITH THE 1987 SUPPLEMENTAL APPROPRIATIONS ACT

Just last year, the Congress examined the Administration's proposed drug testing program. The result was an attempt to ensure a modicum of rationality and fairness in the implementation of this program in Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71 Stat. 391, 468-471 codified at 5 U.S.C. 7301. That statute limits the use of appropriated funds for the administration or implementation of any drug testing program pursuant to Executive Order No. 12564 unless or until certain specified conditions are met.

Included under these specified conditions are:

1) an absolute requirement that agency drug testing comply with all applicable provisions of law, including the Rehabilitation Act of 1973 and the Civil Service Act of 1978; and
2) the submission of detailed, agency-by-agency plans relating to--
    a) the criteria and procedures in designating positions for testing;
    b) the position titles to be tested; and

c) the frequency, nature and type of drug testing.

The Secretary of Health and Human Services is required to submit the detailed agency plans to Congress, and to certify that the plans are in compliance with applicable laws,including the requirements of Section 503. This he has done.

The Conference Committee Report on Section 503 makes clear the Committee's intent that the legal "protections afforded federal employees are continued in agency drug testing programs," and that "random testing of federal employees is not implemented on an ad hoc basis." Further, Section 503 was intended, according to the Report, "to assure that federal workers employed by different agencies who are similarly situated receive similar treatment." Drug testing programs were not to be arbitrary, nor were they to undermine or deny the protections for federal employees under existing law.

Even a cursory review of the plans, however, reveals a program that is arbitrary, even whimsical, and patently inconsistent with existing law. These plans do not secure the public safety, but instead they pilfer the public purse without reason or regard for any legitimate public purpose.

The plans do violence to the Congressional intent that employees not be subject to "ad hoc" testing programs, and that all such programs be conducted in conformance with law.

In the position titles designated for testing and in the justification for the selection of these positions, we are confronted with an exercise in silliness that cannot be redeemed by rhetoric. The all-purpose rubric of "national security" so often used in the past to conceal the failings of prior Administrations is being employed here to confuse "important" with "sensitive," and to suggest grave implications for the national security, when in fact what is meant is that these positions are responsible and important. Given this formulation, who among us would not qualify? Consider just a sample of some of the position titles designated for testing under the agency plans.

Attorney General Meese's Department of Justice, for example, created a "drug impact statement" to justify testing virtually all its employees. The following positions are subject to the specimen bottle test of personal integrity:

- "Space Management Specialist" because "unwise space usage determination" could result in the rental of excess office space;
- "Administrative Assistant" because of the threat of "improper inventory control"
- "Secretary" in the procurement office because of the possibility of "inappropriate contract awards";
- "Mail Clerk" in the legislative affairs office because of the potential to "jeopardize important legislative priorities";

- "Clerk/Typist" in the central office of the Parole Commission because of concern for the "civil liberties of federal inmates and parolees";
- "Secretary/Stenographer" in the Anti-Trust Division because the ultimate result" of drug use would be higher prices, lower quality of goods and services, and decreased competitiveness for American business in world markets."

What these demonstrate is that someone with a creative mind can come up with a justification for testing anyone. That some agencies read the mandate to test very broadly and some narrowly is entirely predictable, since there are no real standards to guide their discretion. But consider whether anyone in your offices could escape if the Justice Department were writing a program to cover them.

Mr. Meese is not alone, however, in the contest to construct convoluted rationalizations for testing the bodily fluids of federal employees.

"International Affairs Program Specialist" positions in the Department of Housing and Urban Development which exchange information on housing and urban affairs with foreign countries are to be tested because they could threaten "the protection and preservation of the economic strength of the United States."

In the Department of Health and Human Services, "Economist," "Management Analyst," "Accountant," and

"Actuary" positions are in line for the specimen bottle because there might be "inaccurate analysis of complex technical information," and employees in these position could give bad "advice to policymakers."

The Department of Interior designated "Secretary/Typist" positions for drug testing in instances where the employee is responsible for typing the personal disclosure forms of agency administrators because "serious financial hardships for a top-level Department of official" could result from "an improper decision of divestiture."

Somehow I fail to see the connection between protecting the public safety, and the drug testing of typists to prevent purportedly unsound personal investment decisions on the part of top level agency officials. The Interior Department goes further: the "Public Affairs Specialist" is also to be tested because employees "are in a position to substantially influence national news stories and could advance ideas in contradiction of the Administration's positions."

Fortunately, there is inconsistency among the programs, and not all agencies attempt such sweeping, all-inclusive justifications. It is clear that the agencies are casting about for rationale, and that some have strayed much further afield than others in their attempts to comply with President Reagan's demand that every agency implement a broad testing program.

Some agencies test computer personnel while others do not. Some test procurement clerks, and others do not. Some test attorneys while others do not. Obviously, blind uniformity could be achieved by making the programs all inclusive everywhere, but that solution would only compound the irrationality and unfairness.

The inconsistency, the absurdity, and the outright silliness of the selection of positions to be tested are not peculiar to any agency or official. They are rooted in the nature of the program itself. Once you remove the requirement of probable cause to justify the power of the government to invade, search, and violate our persons or our property, you have made vulnerable everything we once held personal, private, and protected. Almost any excuse will do that suits the purposes of those in power.

The Founders conceived and enshrined in our Constitution the protection against unreasonable searches to prevent the very overreaching government intrusion that requires typists to urinate on command to save the "competitiveness of American business." The Reagan Administration is not seeking to protect the American people from immediate and irreparable harm. It is not testing simply to prevent mid-air collisions or other horrifying accidents. It is attempting to divert attention from its inability and unwillingness to take constructive action against the real threat of drug abuse.

The Reagan Administration has consistently opposed increases in the staff of the Customs Service despite proclamations that the Service is the spearhead of the drug interdiction effort at our borders. For FY 1989, the best the President could do was to propose the status quo for Customs Service staffing. Drug testing is not only an attempt to divert public attention from the failure of the Administration's drug war, but it is also a real diversion of real resources away from the real problem.

The estimated cost of the drug testing program envisioned under Executive Order 12564 could provide for more than 1,000 additional Customs employees to safeguard our borders and stem the flow of drugs. The Administration is more interested in the headlines than in the hard work and hard choices that an effective program necessitates.

The cost estimates themselves appear to be a gross understatement. According to the agencies' own estimates, the program will cost $55 million over five years. This estimate excludes the costs associated with the programs of 10 other agencies or divisions of agencies that are already testing.

In breaking down the costs between actual testing and other features of the program (such as employee education, supervisory training, and the like), we see a wide discrepancy. For example, the estimates for 1988 show six times the money being spent on administration as on the testing process itself. There is also a wide variation among agencies. In 1988, the Department of Agriculture will spend less than 10% of its program estimate on the testing process while the Department of Defense will spend over 40% on the testing process. It seems that there is some effort to keep estimates low to ease Congressional opposition.

Given that 25% of the federal workforce will be subject to random testing, not to mention the testing of job applicants, combined with voluntary tests, retests, and confirmation tests, and so-called reasonable suspicion testing, the $15 million dollar, five-year price tag for the actual tests looks like an exercise in wishful thinking.

Thus, since there are no careful standards that require uniform and fair treatment, and apparently no mechanism at HHS or elsewhere for ensuring same, it is not surprising that the various agencies have rationalized their programs in wildly different ways, and that the cost estimates are unquestionably vastly understated. Further, although the Secretary of Health and Human Services has certified to Congress that agency plans are in compliance with all applicable law, without exception the plans are in conflict with the legal protections afforded federal employees under the Civil Service Reform Act and the Rehabilitation Act.

COMPLIANCE WITH THE CSRA AND THE REHABILITATION ACT

Section 503(a)(1)(A)(iii) of Pub. L. 100-71 requires the Secretary of Health and Human Services to certify in writing to Congress that agency drug testing programs and plans established pursuant to the Executive Order comply with applicable provisions of law, including the Civil Service Reform Act and the Rehabilitation Act of 1973. Although the Secretary has so certified to Congress, we believe that without exception the agency plans violate existing law. Indeed, it could hardly be otherwise, because the Orderitself is patently inconsistent with both the Civil Service Reform Act and the Rehabilitation Act.*

1. Under the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111, and decades of law that preceded it, a federal employee may be removed "only for such cause as will promote the efficiency of the civil service." Further, an agency may not discipline an employee on the basis of conduct that "does not adversely affect performance." 5 U.S.C. This statutory language imposes what is known in federal personnel parlance as the "nexus" requirement; employees may not be penalized on the job for off-duty misconduct, even misconduct of a criminal nature, unless the agency shows that

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* It is important to remember that at the time the President issued his Order, he also sought (unsuccessfully) to obtain legislation ("The Drug-Free Federal Workplace Act of 1986") that would amend the Civil Service Reform Act to assure that the Act's so-called nexus requirement would not operate to prevent agencies from disciplining employees who were alleged to use illegal drugs off-duty. That Act would also have divested individuals handicapped by drug abuse of the protections of the Rehabilitation Act. Thus the Administration is well aware of the fact that its plans do not conform to the requirements of those Acts. 2302(b)(10).

the misconduct actually impairs the employee's ability to perform his or her job or the agency's ability to carry out its mission.

The nexus requirement serves a very important policy: it acts to sharply limit the government's authority to intrudeinto, or oversee the private, off-duty lives of its employees. The government may not intrude into private, off-duty conduct because it has no employment related interest in doing so. Obviously, when Congress enshrined the nexus requirement into law, it did not intend to signal its approval, or even its tolerance of illegal or immoral off-duty conduct by federal employees. What Congress explicitly intended was to leave investigation and punishment of illegal conduct entirely to the criminal justice system, unless work-related consequences could be proved by the employer.

The Executive Order blatantly attempts to circumvent the "nexus" requirement. It is emblematic of the Administration's so-called "zero-tolerance" policy, whose ends, while admirable, often seem to be sought through overbroad, heavy-handed means that threaten other important social values. The Order attempts to circumvent the civil service law by declaring that any instance of illegal drug use by any federal employee impairs the efficiency of the service, regardless of the circumstances of the use, the employee's position, or the mission of the agency he or she works for. After so declaring, the Order goes on to direct agencies to ferret out such off-duty misconduct by conducting urinalyses, and to require agencies to discipline any federal employee determined to have used an illegal drug.

The Executive Order thus not only illegally presumes that a nexus exists betweem drug use, regardless of circumstances, and job performance, but uses that illegal presumption to justify searching to see whether misconduct exists at all. By definition, the overwhelming majority of those searched are innocent of wrongdoing. What has become of the important nexus requirement?

Plainly, the inquiry into the private lives of federal employees accomplished by the Order's attempt to abolish the nexus requirement, exemplifies precisely the evil Congress sought to avoid when it enacted the requirement into law. It bears repeating here that it is not our contention that off-duty drug use is acceptable behavior by federal employees or by any other employees. However, whether off-duty drug use is actionable by the employer depends upon a case-by-case analysis of the circumstances of that use, the employee's position and the nature of his or her duties, and the specific mission of the employer agency. It is this vitally important case-by-case analysis that the Executive Order would eliminate. In so doing, the Order seeks to justify intrusions into the personal privacy of the vast majority of federal employees who do not use illegal drugs and for whom off-duty drug use would, in any event, not be a proper subject of inquiry by their employer.

The plans certified by the Secretary of HHS do not conform to the requirements of the Civil Service Reform Act. Without exception, they all mandate discipline of any federal employee found to have used an illegal drug, whether on duty or off, regardless of the employee's position or the circumstances of drug use. The sanctions available range from a letter of reprimand to removal. While the plans permit the supervisor to exercise discretion as to which penalty to impose for a first offense, in every instance the agency requires at least some level of discipline, which will be permanently recorded in an employee's personnel file. On a second offense, dismissal is mandatory.

Thus, the agency plans violate the fundamental principle underlying the Civil Service Reform Act: that investigation and punishment of criminal conduct is not properly a function of the federal personnel system. The Order authorizes and indeed requires agencies to conduct highly intrusive inquiries into off-duty misconduct that may have nothing to do with an employee's job performance. In fact, the Order and the plans provide that a supervisor can order any federal employee to produce a urine sample under direct observation when the supervisor believes that there are reasonable grounds for suspecting that the employee has used an illegal drug--even off duty. Ordinarily, of course, in order to conduct a search as intrusive as this, the government would have to secure a warrant based upon probable cause. By abolishing the nexus requirement it must ordinarily apply as an employer, the government attempts to benefit from the more relaxed "reasonable suspicion" standard the Supreme Court has said is applicable to certain work related searches, even though the urine tests will not reveal evidence of work-related misconduct. As one can readily see, the plans implemented under the Executive Order illustrate precisely the overreaching made possible when the nexus requirement of the Civil Service Reform Act is ignored.

2. The plans fail to conform as well to another applicable law--the Rehabilitation Act of 1973. Again, this is because the Order itself--in its zeal to ferret out illegal drug use--makes compliance with the Rehabilitation Act an impossibility by requiring agencies to fire individuals who have undergone treatment if they have a single relapse. This punitive treatment is required despite the fact that relapse is viewed by substance abuse treatment specialists to be a common phenomenon among those undergoing treatment, that relapse is not a sign of treatment failure, and that in fact relapse is sometimes viewed as therapeutic.

Federal law prohibits the government from "discriminat[ing] for or against any employee or applicant for employment on the basis of a handicapping condition, as prohibited under Section 501 of the Rehabilitation Act of

1973 (29 U.S.C. 791)." 5 U.S.C. 2302(b)(1). Alcoholism and other drug abuse are considered handicapping conditions under Section 501 of the Rehabilitation Act. Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984), aff'd, 790 F.2d 964 (D.C.Cir. 1986); Ruzek v. General Services Administration, 7 M.S.P.B. 301 (1981).

Under Section 501, federal agency employers "have a duty of affirmative action toward handicapped employees and applicants." Whitlock, supra, 598 F. Supp. at 130. In fact, "'the legislative history of Section 501 illustrates that with respect to the employment of handicapped individuals, Congress expected that the federal government should be a leader,' "and 'act as the model employer of the handicapped'." Prewitt v. United States Postal Service, 662 F.2d 292, 302-303 (5th Cir. 1981), quoting Cong. Rec. S15591 (September 20, 1978) (remarks of Senator Cranston). As the court explained in Whitlock, "this affirmative action obligation is more than a requirement of non-discrimination or even-handed treatment. Federal agency employers are required to make 'reasonable accommodation' to the limitations of a handicapped employee unless the agency can show such accommodation would impose an 'undue hardship' on its operations." 598 F. Supp. at 130, quoting 29 C.F.R. 1613.704.

The Rehabilitation Act, read together with other complementary statutes, in light of their legislative history, "show Congress' firm intention to require federal employers to exert substantial affirmative efforts to assist alcoholic [and other drug abusing] employees toward overcoming their handicap before firing them for performance deficiencies related to drinking [or drug abuse]." Whitlock, 598 F. Supp. at 131. Indeed, the Senate Report accompanying the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, indicates that substance abuse "is appropriately handled only through medical and rehabilitative treatment," and concluded that "traditional punitive measures can be expected to have little or no effect on behavior that arises from illness." S. Rep. 91-1069, 91st Cong., 2d Sess. 10 (1970).

This policy of reasonable accommodation is more than a humanitarian gesture; it makes good sense from a management and public policy perspective as well. It is obviously more cost effective for the government to offer rehabilitative assistance to employees facing temporary incapacitation due to substance abuse than to fire the employee and pay the costs of training a replacement and financing the public assistance that he or she and family will undoubtedly require.

Although the Executive Order and the plans that implement it purport to have rehabilitation rather than punishment as their goal, in fact, they pay only lip-service to rehabilitation. Under these plans, employees who have undergone counselling and treatment, whether voluntarily or because faced with the loss of their positions, are subject to follow-up urinalyses for up to a year following completion of treatment. If an employee is determined to have used an illegal drug through that follow up testing or at any other time thereafter, the employee must be fired.

This new federal policy is one that tolerates no relapse, and ignores the fact that relapse occurs in most individuals with a significant drug problem. Some relapses are viewed as therapeutic and are referred to as such in the treatment field. Although the Order speaks of offering a "helping hand" to employees with drug problems, under its mandatory dismissal provisions, the other veiled fist is waiting to dispatch the employee from the federal service, and perhaps onto the welfare rolls, at the first slip. It is clear that this intolerant policy provides a tremendous disincentive to those who might otherwise voluntarily seek help.

Of course, we do not believe that the Rehabilitation Act requires the federal government to countenance repeated unsuccessful attempts at treatment. Instead, what the Act requires is "reasonable accommodation" and, as the court held in Whitlock, it is not reasonable to "automatically give up on an employee who enters treatment but who subsequently relapses." 598 F. Supp. at 134. The complex determination of whether it is time to give up on an employee should not be made on the basis of a single positive urine test or any other mechanical device. It is a decision that the agency should make, as it has in the past, after consultation with treatment specialists on the basis of all of the facts and circumstances.

In short, the plans certified by the Secretary of Health and Human Services are not consistent with either the Civil Service Reform Act or the Rehabilitation Act of 1973. Legal challenge to disciplinary actions taken pursuant to these plans is inevitable and, we believe, will ultimately be successful. Of course, it is most unfortunate that the Administration intends to implement these disciplinary provisions that it knows full well are inconsistent with existing law and force employees to pursue such costly legal challenges in order to vindicate the policies underlying the Civil Service Reform Act and the Rehabilitation Act. It is equally unfortunate that the Secretary of HHS did not take seriously Congress' mandate to assure that agency plans are in accordance with applicable laws. We turn finally to our review of flaws in the testing guidelines published by the Department of Health and Human Services.

HHS GUIDELINES AND TESTING PROCEDURES

As the Committee is aware, the Department of Health and Human Services recently published in final form the technical and scientific guidelines for implementation of the Executive Order. Congress' aim in requiring HHS to publish these guidelines for public comment was clearly to require the agencies, to the greatest extent possible, to assure the accuracy of test results, and to minimize the privacy invasion that necessarily accompanies urine testing. We believe that no matter how strict the guidelines, in a testing program as massive as that contemplated under the Executive Order, error is inevitable, and that it will be impossible to avoid breaches of those guidelines in terms of protecting privacy, given the fact that the testing is being conducted by private contractors. But even aside from these general concerns, we believe that the guidelines themselves are seriously flawed in a number of important respects. It is to those flaws that I now turn.

1. Specimen Collection Procedures

The procedures for collection of urine samples provide that a "collection site person" shall be responsible for monitoring the subject of the test while he or she urinates in order to guard against adulteration of the urine samples. HHS Guideline 2.2(f). The monitor is to request identification, ask the employee to remove outer garments and surrender personal belongings, instruct the employee to wash his or her hands, and then remain nearby while the employee urinates into a specimen cup either in a stall or behind a partition. The "collection site person" is to "note any unusual behavior or appearance in the permanent record book." Thereafter, the monitor is to visually inspect the sample and check its temperature. "Unusual findings" are recorded in the permanent record book.

Whenever the collection site monitor has "reason to believe that a particular individual may alter or substitute the specimen to be provided," and obtains the concurrence of his or her supervisor, he or she must obtain a second urine specimen; this time the specimen is to be produced under the monitor's direct observation. HHS Guideline 2.2(f)(16) & (23). The regulations state that when the temperature of the urine specimen falls outside of a certain range, that constitutes "reason to believe" the employee has cheated on his test. Id. at 2.2(f)(13). Otherwise, they give no examples of what kinds of behavior will trigger the directly observed test.

In our comments on this regulation, we noted that it contains much potential for abuse of the privacy and dignity of innocent employees. First, the regulation fails to define the qualifications of the "collection site person." These individuals apparently have great authority over employees and are being asked to make some important judgments about their behavior, judgments that are permanently recorded and can be the basis for requiring the employees to engage in the act of urination under their direct observation. Moreover, these persons have the opportunity to deliberately tamper with or negligently mishandle urine samples before they even get to the laboratory. We suggested, and still believe, that

HHS should establish the minimum qualifications for these individuals, which include training and background investigations.

Second, and perhaps most important, the regulations fail to define or even give any examples of the kind of "unusual behavior or appearance" that should be permanently recorded and serve as the basis for requiring an employee to pass urine under direct observation. We do not understand what behavior or appearance is considered "unusual" for an innocent individual who is, on a random and surprise basis, asked to produce a urine sample under the conditions set forth in the guidelines, and we do not understand what standards these untrained collection site persons will use to make that determination. HHS has certainly provided no standard. Many, if not most, employees will be apprehensive and embarrassed about urinating under scrutiny; some may have health problems that make it difficult for them to do so. Women who are menstruating may be particularly uncomfortable. Nor is it clear that collection site persons have the psychological or medical training necessary to assess employees' behavior or appearance.

HHS must be required to give meaningful content to this standard and to set qualification and training requirements for collection site persons. In its final regulations HHS states that it will not define "unusual behavior" although that "might be desirable" because it "cannot foresee or define every contingency which might occur." HHS Response No. 9, 53 Fed. Reg. 11973. This is nonsense. HHS need not create an exhaustive list of "unusual" behaviors. However, it surely cannot dispatch thousands of monitors of dubious qualifications to scrutinize and record the behavior of urinating employees without any guidance at all, except the subjective standard of "unusual" behavior. This is all the more true since the decisions of those monitors, applying the subjective standard, will be the basis for requiring employees to urinate under direct observation.

2. Sample Splitting

Another very serious flaw in the guidelines is in their failure to require sample-splitting before the urine specimen is sent to the laboratory. Under the current guidelines, once collected, urine samples are mailed to the laboratory for analysis. An employee whose sample tests positive is entitled to have a portion of that sample retested. While this protection allows an employee to challenge errors in analysis, it gives the employee no method to challenge a false positive caused either by sample contamination at the laboratory or by sample switching. Our consultants have told us that it is essential that samples be split before they are sent to the laboratory, so that all errors, not just those of analysis, can be corrected by retesting.

HHS rejected this requirement as too expensive and cumbersome. HHS Response No. 1, 53 Fed. Reg. 11971. It claims that the split sample would actually increase the chances of administrative error by doubling the number of samples. We recognize that splitting the sample would be more expensive. However, we do not believe that increased cost is a justifiable basis for diminishing the protection of employees from inaccurate tests. If it is too expensive to conduct the tests accurately, then they should not be conducted at all. Moreover, while the chances for administrative errors generally may increase when the number of samples increases, the chances of error that will cause false positives decreases, since only those employees whose tests are reported positive would test the portion of the sample saved at collection.

3. Medical Review Officer

The guidelines provide that a "Medical Review Officer" will decide whether there is an alternative medical explanation for a positive test result. HHS Guideline 2.7(b). It indicates that the MRO must review medical records made available by the employee and, if these are not sufficient, grant the employee an interview. The regulation does not make it clear when an employee will be required to supply information about prescriptions or medical conditions. Under the Customs program, for example, employees are asked to give detailed medical information to the collection site monitor at the time that they submit their samples. We believe that this results in unnecessary disclosure of personal matters and that an employee should not be asked to provide such information unless his result is confirmed positive. HHS did not respond to this comment.

4. Proficiency Testing for Certified Laboratories

The regulations provide that if an "administrative" error is detected during proficiency testing and there is reason to believe the error is systemic, then the reviewing official may order a reanalysis of previously run specimens. HHS Guideline 3.19(b)(iv). We believe that this course should be mandatory, and not optional. Moreover, we believe that the discovery of systemic administrative error or an error in analysis should trigger an obligation to so inform all employees who have tested positive during that cycle, as well as the incumbent union. The activities of these laboratories, which are anxiously anticipating lucrative profits from the federal employee testing program, should be completely open to public scrutiny.

5. Inspections of Laboratories

The guidelines provide that agencies shall inspect laboratories twice a year after certification. HHS Guidelines 2.4(1); 3.20. We believe that agencies should be required to conduct a minimum number of unannounced laboratory inspections each year. The present regulations leave this in the agencies' discretion.

Further, union representatives should be permitted to accompany the inspectors in order to protect the interests of employees. HHS declined to allow union representation, claiming it would "significantly complicate coordination and conduct of the inspections." HHS Response No. 36, 53 Fed. Reg. 11947. This bald assertion is insupportable. All the agency need do is give the union notice of the time and location of the inspection, and the union representative will then merely accompany the inspector as an observer. Similar rights are granted to mine employees when safety inspections are conducted in federal mines.

Likewise, HHS' statement that laboratories will be hesitant to cooperate if union officials are present because of fear of disclosure of proprietary information is bizarre and unconvincing. First of all, it is inappropriate to speak of "proprietary" or secret information in the context of drug testing laboratories that are being regulated and inspected precisely in order to disclose their methods and equipment to scrutiny. In fact, inspection records must be made available to the public. HHS Guideline 2.4(m). Moreover, laboratories that seek to do business with the federal government in this highly sensitive area may be compelled to "cooperate" in permitting the representatives of employees to observe inspections, as a contractual commitment.

6. Future Revisions

The guidelines state that all future revisions will be published in final form in the federal register with no opportunity for comment. HHS Guideline 1.3. HHS reasons that the time required for notice and comment "would not permit rapid adjustment to changes in technology." HHS Response No. 41, 53 Fed. Reg. 11978. We believe that the assertion of blanket authority to revise these guidelines without notice and comment violates the spirit, if not the letter of the original statutory requirement. It is difficult to conceive of changes in technology that would require adjustment so "rapid" that notice and comment would be impractical. Moreover, revisions not necessitated by changes in technology are not subject to the same objection, and should surely be accompanied by notice and comment.

It is our understanding that the General Accounting Office is currently investigating at least some of the concerns over the HHS guidelines that I have mentioned today. We believe, however, that more than an investigation is required. The defects in the HHS guidelines are serious ones that merit correction before any testing begins. Therefore, we would urge that Congress act to freeze implementation of the Order, pending revision of the guidelines.

In sum, we believe that the Congress should not permit appropriated funds to be spent on further implementation of the Administration's drug testing program before the Supreme Court provides constitutional guidance. And even if the program were not in violation of the Fourth Amendment, it is so badly designed, so inequitably applied, and so ill-advised that it should not be permitted to proceed.

Mr. SIKORSKI. Thank you, Lois Williams, from the National Treasury Employees Union.

Mark Roth is general counsel for AFGE, the American Federation of Government Employees.

Mark.

STATEMENT OF MARK ROTH, GENERAL COUNSEL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. ROTH. Thank you, Mr. Chairman.

I would like my written statement to be placed in the record also.

Mr. SIKORSKI. It will be, without objection.

Mr. ROTH. We were asked to give our views on the compliance of the drug testing program and HHS regulations with the statutory language in Public Law 100-71, but before I do that, I would like to go on record once again, as our union has many times, in opposition to the legality of this program. We are fighting it now like the other unions in a lot of different settings, in court. We have had some successes, and we are continuing to push the issue of the constitutionality, or lack thereof, of this program, random testing, and also a program that punishes employees without any nexus to their job performance.

But these legal concerns aside for the moment, this program really doesn't even meet the standard of common sense. Two weeks ago, CBS Evening News reported on the grounding of Coast Guard ships and reduced Coast Guard interdiction efforts due to budget constraints, yet here we have OMB's very conservative estimates that this drug testing program is going to cost about $15 million in its first year and $10 million every year thereafter, and we have to ask, can this trade-off be defended, seriously defended?

Citing just one AFGE example, as a part of the negotiations in the Immigration and Naturalization Service, our bargaining council asked that agency the cost of its drug testing program and the number of substance abuse referrals it had made over the last three years. We think the answers are eye-opening. The agency estimates that it will cost them roughly $400,000 to implement the program in its first year, and they have also reported that out of 10,000 employees in their work force they had made just 31 referrals for treatment or counseling for substance abuse over the last 3 years. Of course, that was at a time when employees were encouraged to go forward, unlike now, so that would probably be a very high figure with people volunteering to go into the programs.

We just have to ask, can anyone here justify spending $400,000 per year on a problem affecting roughly one-one-hundredth of 1 percent of the work force at the same time that we don't have the monies to keep the drug smuggling out at our borders? So we think that there are definitely misplaced goals and misplaced objectives here.

This administration has been a forceful proponent of cost-benefit analysis of all other Government and social welfare programs. Where is the cost-benefit study for this program?

How many positives have been recorded at Customs, or Transportation, or Army where programs are in place? It is our understanding that it is probably about 1 percent of the work force.

What is the breakdown by type of drug? What relation is there to the employee's performance evaluation? What has been the Government's costs for a positive finding? We look forward to an answer to all of these questions.

A lot of these questions, of course, might have been inquired into before they started these programs, such as, where is the drug problem? We have always said that the drug problem isn't in the Federal work site, because the complexion of the Federal employee just doesn't match any of the complexions of drug users.

As far as the actual agency drug testing programs, we are still in the very early stages of actual implementation, because we have been successful in some of our court efforts. We do want to draw your attention to one case, though, involving a false positive in the Department of Transportation, because I thought I heard Chairman Horner say that at OPM they are going to use the Department of Transportation plan.

The case in point involves an employee late last year whose urine sample came back marked positive for PCP, cocaine, and marijuana, although the employee swore that he was not a drug user. His supervisor in that case went to bat for him and vigorously pursued the matter all the way up to the agency's chief medical review officer, who, in turn, demanded that the laboratory recheck its records, and the lab, Compuchem, found that the employee was, in fact, a victim of a lab error.

Dare I say that if that had been Constance Horner's lab specimen I don't think we would be here today talking about this.

The employee in question was lucky to have a supervisor who was believing, and sympathetic, and went to bat for him, and helped prove his innocence. But the incident serves to highlight the fact that mistakes will be made no matter how great the procedures look on paper, and of course we feel there are some problems with these procedures.

But the bottom line is, mistakes will occur; innocent workers will be victimized.

Although we have not finished our review of each agency's program, because we represent employees in hundreds of agencies, several points are readily evident. The agencies have cast a wide net over who is going to be included in the testing pools. In the VA, 60 percent of the employees are in the pool, and it is amazing to us that in that pool of high-risk employees they have included gardeners and air-conditioning mechanics. I don't know what they are gardening in the VA, but they have included these as high-risk, sensitive employees. The Department of Agriculture has 7,280 positions in its pool, and that actually includes the cooks at the National Oceanic and Atmospheric Administration as being, again, high risk and sensitive. We don't know whom they are cooking for, of course. The Department of the Interior has fully 24 percent of its employees in its testing pool.

As you have pointed out, Mr. Chairman, it is at least unusual that HHS that designed and engineered this whole program is only testing for two drugs but every other agency is incurring the expense of testing for five. I applaud your efforts and your persistence in trying to get a straight answer on why. I think there might have been some mixed results on that. I'm not sure I follow why HHS is not testing for five drugs when it is their own guidelines that suggest five drugs or at least permit it.

The annual frequency of the testing varies tremendously, as you and Representative Gilman stated. We have in some agencies, like the Defense Contract Audit Agency, only 2 percent of the pool will be tested, but at the Department of Education, for some reason, 100 percent of the pool will be tested.

Our written statement brought to the committee's attention, and Representative Gilman and yourself have cited a number of those instances of failings that we believe are in the regs. I want to just mention a couple that I'm not sure were explained to my satisfaction.

Our point on the re-analysis issue wasn't that the original sample be re-analyzed with a better test. We know that that is in the regs. We are talking about where there is an administrative error. To find out the scope of that administrative error, we are suggesting that the entire batch, no matter how far that goes, the entire batch of positive tests where there has been a lab error be retested. That is the only fair thing to do for the employee. Otherwise, another employee with a positive test will never be able to prove their innocence. They may not know that there was a lab error, and no one may get into the scope of the error even though it was brought up in one employee's test.

The sample splitting—I must say that I have been educated today in knowing that there are a lot of different ways of sample splitting. The one that we are calling for and I think Secretary Bowen also called for, from the context of his statement at least, is where you have an employee and the specimen is split in the beginning, and part of that original sample is given to another lab or some other sanitary and professional place, not given to the same lab that made the mistake on the first or second test.

Finally, the employee confidentiality that we were talking about, again, should not attach after there is a positive finding. We can't see the reason that an employee should have to list all the prescription drugs that they have taken and disclose all their medical conditions if their tests are not positive. If the test turns up positive, fine; you can explain it and document it. But, other than that, why should the supervisors and all the other people in this pool of testers know that information?

In conclusion, pending our expected judicial victories, we look forward to a new administration which we hope will have the sense to halt the demeaning and privacy-invading practice of dragnet testing its employees for drugs and, instead, address the crises in Federal employee compensation, health benefits, training, political rights, and staffing that threaten the career Civil Service.

[The statement of Mr. Roth follows:]

MARK ROTH
GENERAL COUNSEL
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

My name is Kenneth T. Blaylock. I am the National President of the American Federation of Government Employees (AFGE), AFL-CIO. AFGE represents some 700,000 government employees.

We want to express our appreciation to Chairman Sikorski and Chairwoman Schroeder and their respective Subcommittees for their continuing oversight of the Administration's drug testing program.

We were asked to give our views on the compliance of the drug testing program and regulations with the statutory language in Pub. L. 100-71. Prior to that, however, we want to once again go on the record in opposition to this program.

Our opposition to the program on legal and constitutional grounds are well-known and are still being argued in various court settings. We will always oppose this program or any other program which assumes employees are guilty until they prove their innocence.

But, these concerns aside, this program doesn't even meet the standard of common sense. Two weeks ago, CBS Evening News reported on the grounding of Coast Guard ships and reduced Coast Guard interdiction efforts due to budget constraints yet OMB's very conservative estimate is that this drug testing program will cost 15 million in the first year and 10 million in subsequent years. Can this tradeoff be seriously defended.

For example, as a part of their negotiations, our Immigration and Naturalization Service Council asked the agency the cost of the program and the number of substance abuse referrals made by the agency over the past three years. The answers are eye opening. The agency estimates it will cost them roughly $400,000 to implement the program in the first year. (This does not include the wages for the lost time during the testing.) They also reported that out of a 10,000 workforce, they had made 31 referrals for treatment, counseling, etc. for substance abuse over the last three years -- a whopping 10.3 per year. Can anyone here justify spending $400,000 per year on a problem affecting roughly one one-hundredth of one percent of the workforce? Does this make sense?

It is our understanding that the General Accounting Office is reviewing the OMB cost estimate and we look forward to their report.

This Administration has been a forceful proponent of cost benefit analysis for almost all government policies. Where is the cost benefit study for this program? How many positives have been recorded so far? What is the breakdown by type of drug? What relation is there to the employee's performance evaluation? What has been the government's cost per positive finding? We look forward to the answer to these questions.

We are also pleased to see the Committees intend to question Administration officials on the status and development of Employee Assistance Programs (EAPs). As we stated before the Human Resources Subcommittee last year on April 7, with some exceptions, these programs are largely paper creations with insufficient personnel or resources to do a successful job.

A continuing problem with the Administration's program is the issue of confidentiality and the independence of the EAP. In talking with AFGE locals with a history of successful drug abuse programs working in cooperation with their agency, they stressed that the EAP must be perceived by the employees as existing to help them solve their problems. It cannot be seen as existing to help the employer "deal" with problem employees. Thus, successful EAPs have a strong need for confidentiality and a separation from adverse personnel actions. Otherwise, employees will avoid EAPs like the plague.

The OPM regulations (Section 3e) invalidates the confidentiality and independence of the EAP. This provision encourages agency heads to mandate unannounced follow-up drug testing [illegible] all participants in EAPs for drug reasons. If follow-up testing reveals drug use, such employees would be subject to dismissal.

Because self-identification as an illegal drug user now also carries with it, under the Executive Order, the likelihood of follow-up testing and subsequent firing, such employees are less likely to voluntarily come forward.

Prior to the Executive Order, our locals often acted to encourage and refer employees with a substance abuse problem to the agency's EAP. Our locals are now much more reluctant to make such a referral because it might contradict their duty to protect such employees from adverse personnel actions. Indeed, some locals are advising employees with substance abuse problems to avoid EAPs and seek outside help.

We are still in the very early stages in most agencies on the actual implementation of the drug testing program. Therefore, we are just beginning to receive initial reports from our locals. We want to draw your attention to one case involving a false positive in the Department of Transportation.

The case in point involves an employee late last year, whose urine sample came back from the laboratory as "positive," even though the employee swore he did not use marijuana, cocaine or PCP--the three drugs which allegedly showed up in the test.

When the employee protested the results, his supervisor brought the matter to the attention of the agency's chief Medical Review Officer, who in turn asked the laboratory to recheck its records.

It did not take long before the lab--Compuchem--found that the wrong control number had been affixed to the questioned sample, thus, identifying the wrong employee as a drug user.

This employee was lucky to have a sympathetic and believing supervisor who was willing to help him prove his innocence, but serves to highlight the fact that no matter how carefully the procedures are written, mistakes can and will occur.

Although we have not finished our review of each agency's program, several points are evident. The agencies have cast a wide net in determining who will be included in the testing pool. For example, in the Veterans Administration, 60.0% of the employees are in the pool including gardeners and air condition mechanics. The Department of Agriculture has 7,280 positions in its pool and includes cooks of the National Oceanic and Atmospheric Administration. The Department of the Interior has 24% of its employees in its testing pool and includes teachers and contract specialists.

Second, the drugs tested for are not uniform between agencies. The Department of Health and Human Services and the Small Business Administration have opted only to test for marijuana and cocaine while most other agencies are also testing for opiates, amphetamines and PCP.

Similarly, the annual frequency of the testing varies tremendously between agencies ranging from 2% of the pool at the Defense Contract Audit Agency to 100% at the Department of Education.

We want to bring to your attention a series of weaknesses in the Department of Health and Human Services' final technical and scientific regulations which do not meet the requirements of Pub.L. 100-71. In particular, the clear congressional intent was to offer employees privacy and test accuracy using the best technology and procedures available. The HHS guidelines fail in the following areas:

1. No standards are set for the "collection site persons" who collect the samples and monitor the program. We recommend that minimum qualifications be established for such person, which includes a background investigation. We also recommend the guidelines require specific training for collection site persons.

2. The guidelines do not sufficiently define "unusual behavior or appearance" (which is to be permanently recorded and serve as the basis to undertake direct observation). At a minimum, the guidelines should list the types of behavior which would meet the standard to provide guidance to the collection site people.

3. The guidelines do not require sample splitting which is necessary to fully protect employees from mistakes. The split sample should be kept at a location other than the laboratories. Such a practice would protect employees in such as the previously cited DOT case. Furthermore, in testimony on April 29, of this year before the Senate Appropriations Subcommittee on Labor, Health, and Human Services, Education, and related agencies, Senator Barbara Mikulski asked the Secretary of HHS Otis Bowen if sample splitting was required and Bowen replied,

   > "I think that is a necessity, and yes, I think that is something that is sort of taken for granted..."

   Despite Secretary Bowen's assurance, this is not the current practice.

4. The guidelines should explicitly require a reanalysis of previously run positive specimens, when an error is detected.

5. The guidelines should insure that laboratory standards are upheld by requiring unannounced inspections.

6. Finally, employee confidentiality should not be better protected by explicitly allowing employees to not disclose medical conditions and prescription drug use unless their tests are positive.

In conclusion, we look forward to a new Administration which we hope will halt the demeaning, degrading, humiliating, and privacy invading practices of testing for drugs and submitting employees to lie detectors and instead address the crises in federal employee compensation, health benefits, training, political rights, and staffing to rebuild our career civil service.

Mr. Sikorski. Thank you very much, Mr. Roth.

Beth Moten is our final witness today. She is the director of legislation for the National Federation of Federal Employees.

Welcome.

We have a vote, and I have 15 minutes to get over there, so if we can keep it around 5 or 7 minutes, then we can keep you from having to stay here.

STATEMENT OF BETH MOTEN, DIRECTOR OF LEGISLATION, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, ACCOMPANIED BY BRUCE HEPPEN, DEPUTY GENERAL COUNSEL

Ms. Moten. Thank you, Mr. Chairman. I will summarize very briefly, Mr. Chairman. I will begin my testimony by discussing our litigation on drug testing.

The constitutionality issue has been the primary argument in our initial lawsuit to block the testing of 10,000 Army employees at Aberdeen Proving Ground, Maryland, and elsewhere. An appeal of the preliminary injunction will be argued before the D.C. Circuit Court of Appeals in October. Random drug testing has been performed at Aberdeen and other Department of Army installations for over two years. NFFE is also party to the lawsuit before the U.S. District Court in New Orleans attacking the Executive Order and implementing regulations.

In our review of the individual agency plans, NFFE has detected some serious problems. In the Department of the Interior as well as the Veterans' Administration, for example, our paramount concern is the over-inclusiveness of the program; 34 percent of the employees in the National Park Service, 37 percent of the employees of the Bureau of Indian Affairs, and 57 percent of the employees in the Veterans' Administration are in positions which are considered so sensitive that employees' constitutional rights will be violated through the use of random urinalysis.

One of the most egregious examples of the testing program's over-inclusiveness is the inclusion of 3,000 employees in the Bureau of Indian Affairs' schools in teacher, education specialist, and guidance counselor positions, and 500 more in education aide positions. The BIA designated these positions despite the fact that not a single public school plan to require classroom teachers to undergo random urinalysis has withstood judicial review.

In addition, out of 345,000 positions identified for testing by 41 Federal agencies, the VA accounts for 130,000 of those positions, over one-third of the total number of employees to be tested nationwide.

The Department of Health and Human Services, which also provides health services, has identified only 8,661 of its employees in the testing pool.

In practical terms, the VA's current struggle to recruit and retain health-care employees will only intensify because of the broadness of its testing program. Health-care employees who can receive higher pay and better benefits from other hospitals will be inclined to work elsewhere once the VA compels employees to urinate on demand.

In conclusion, let me just say that most of our concerns listed here today are not new. However, in the two and one-half years since the President's Commission on Organized Crime first proposed testing Federal workers at random for narcotics use, Congress has done little except to hold hearings and pass minor legislation to force HHS to promulgate basic scientific guidelines and require a cost estimate from the Office of Management and Budget.

What Federal workers need to combat this most humiliating of programs is strong congressional leadership. One cannot help but wonder how long this program would last if Members of Congress were also forced to submit to random urinalysis. We urge you and the members of this subcommittee to move quickly to pass H.R. 280, the bill introduced by Congressman Gary Ackerman to ban drug testing except in cases of reasonable suspicion based on job impairment, and we look forward to working with you to stop this flagrant violation of Federal workers' rights.

In addition, if I could, Mr. Heppen has a few comments on some of our negotiations problems.

Mr. **Sikorski**. Go ahead.

Mr. **Heppen**. I promise to keep it brief.

We have been talking a little bit about sample splitting today and about whether or not this offers a good alternative or good protection for employees, and people have alluded to the testimony from Secretary Bowen.

I think it is noteworthy that the Department of the Army, in a series of cases, has declared that idea non-negotiable as a bargaining proposal made by several different unions. The FLRA did declare it negotiable, but the Army, characteristically taking the matter as far as it could, has appealed the matter to the United States Court of Appeals for the D.C. Circuit. So even this rather minor kind of protective device is not going to be implemented any time soon. For 10,000 Army employees who have been tested for two years, who have been trying at least to get that protection, they are not going to get it any time soon.

I think that relates to the fact that testing is ongoing and is going to start without a lot of protection is an important one. The director of OPM talked about, as one of the protective methods, the idea that employees could appeal their designation as testing sensitive. I don't think it is going to help to prevent employees from being tested in the beginning. Perhaps six months down the road, ten months down the road, the appeals will be culminated and the decisions made, but it is going to be a slow process, and in the interim there is absolutely nothing in the HHS regs nor in the OPM regulations that prevents an agency from being subject to testing.

I want to remind you, Mr. Chairman, of the woman who testified here last year, Sandy Thompson, the woman who had the false positive at Aberdeen. She wasn't upset because she suffered an adverse action; nothing happened to her in her job status; she wasn't removed; she wasn't suspended; nothing happened. The error was caught relatively early, and, like perhaps the example that Mr. Roth cited, her supervisors trusted in her, so they came down to help her. But she was indignant, she was offended, she felt that her basic rights as an employee had been trampled upon, and nothing in the OPM regulations will prevent that experience from occurring.

I would just also like to refer to this Army program that we have. The numbers that we have in 18 months of testing are that in 12,000 tests that were conducted, the positive rate was 0.5 percent. That means, if you extrapolate that across the 2.1 million Federal workers, perhaps you get a total of 11,000 employees that might be identified, and I would submit that if the Government were to spend the money that it is going to use on testing, instead, to beef up the EAP's and to make them a consentual, a more viable option, that perhaps we would have a better chance of helping people and dealing with the problem.

I think it is kind of significant that in Director Horner's testimony she refers to the success of the EAP's already: With only $19 million, they have helped 4,200 employees. I submit that another 5,000 could easily be helped with 50 or whatever—a significant addition to that $19 million. I think that the money that is being spent on drug testing could much better be spent on EAP's.

Thank you, Mr. Chairman.

[The statement of NFFE follows:]

STATEMENT BY

THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES

On behalf of the National Federation of Federal Employees, which represents over 150,000 Federal workers across the nation, we appreciate the opportunity to present our views on the current status of the Administration's Federal employee drug testing program.

This hearing marks the third time NFFE has testified before the Human Resources Subcommittee on the issue of random drug testing of Federal workers. Our opposition to the program has not changed. NFFE believes that random drug testing is the ultimate invasion of a worker's privacy and violates the Fourth Amendment's prohibition against unreasonable searches and seizures.

I will begin my testimony by discussing our litigation on drug testing. The constitutionality issue has been the primary argument in our initial lawsuit to block the testing of 10,000 Army employees at Aberdeen Proving Ground, Maryland and elsewhere (NFFE v. Carlucci, April, 1986). An appeal of the preliminary injunction will be argued before the D.C. Circuit Court of Appeals in October. Random drug testing has been performed at Aberdeen and other Department of Army installations for over two years.

NFFE is also party to the lawsuit before the U.S. District Court in New Orleans, attacking the Executive Order and implementing regulations (NFFE v. Reagan). Two motions are pending in that suit: (1) We have asked the judge to declare all drug testing plans invalid because of his previous ruling that the OPM regulations regarding the Employee Assistance Programs and mandatory discipline were issued without proper notice and comment periods. We expect a ruling on this motion in July.

(2) We have also asked the judge to reinstate the Executive Order lawsuit based on the fact that it is now ripe because all of the Administration plans have been issued. The judge dismissed the suit on April 29, 1988 because the plans had not yet been issued. The next week the Administration transmitted the plans to Congress.

Second, I would like to discuss the Administration's failure to ensure accurate testing under the Technical and Scientific Guidelines published by the Department of Health and Human Services. Public Law 100-71 required that the best technology and procedures available be used in testing Federal employees.

However, the Administration still has not established minimum qualifications for the "collection site person," despite the fact that he or she performs critical functions conducting observations of the employees, establishing a chain of custody, and taking the temperature of the urine samples. Thus, the first link is extremely weak, and there is substantial likelihood that inexperienced collection site personnel will taint the whole procedure.

In addition, the HHS guidelines require that if an employee being tested exhibits "unusual behavior or appearance," the test site monitor is required to note this. Yet no definition exists for "unusual behavior or appearance," and it is hard to fathom what would constitute normal behavior in such a coercive setting.

Furthermore, the OPM regulations issued pursuant to the Executive Order require that an employee may be required to provide a sample under direct observation if there is "reason to believe" that an employee may alter or substitute the specimen. NFFE believes that these regulations authorize direct observation in far too many circumstances. Since the courts have recognized that providing a sample under direct observation is a particularly degrading and humiliating experience, (*See*, *e.g.*, *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D.N.J. 1986)) a narrower definition of "reason to believe" should be provided under the OPM regulations.

NFFE also believes that test accuracy and reliability can only be assured if urine samples are split so that the second portion may be tested if the first portion is determined to be positive. Secretary of HHS Otis Bowen acknowledged in his testimony before the Senate Treasury Appropriations Subcommittee that a truly scientific test would require splitting the sample. Yet HHS has failed to include such a requirement in its guidelines. We also believe that the HHS guidelines are inadequate for proficiency testing of certified drug testing laboratories, as well as inspection of the laboratories on an unannounced basis.

In reviewing the individual agency plans, NFFE has detected some additional problems. In the Department of Interior as well as the Veterans Administration, for example, our paramount concern is the overinclusiveness of the program. Thirty-four percent of the employees in the National Park Service, 37 percent of the employees of the Bureau of Indian Affairs, and 57 percent of the employees in the Veterans Administration are in positions which are considered so sensitive that employees' constitutional rights will be violated through the use of random urinalysis.

NFFE submits that no apparent reason exists for testing many positions, including the following: Supply Technician, Land Law Examiner, and Conveyance Clerk in the Bureau of Land Management; Engineering Equipment Operator and Heavy Mobile Equipment Operator in the National Park Service; Crane Operator in the Fish and Wildlife Service; Cartographic Technician, Photographer, Laborer, and Plate Maker in the Geological Survey; Social Worker and Certifying Officer in the Bureau of Indian Affairs; Electrician, Machinist/Welder and Dredge Hand Operator in the Bureau of Reclamation; Research Chemist and Metallurgist in the Bureau of Mines; and Computer Systems Analyst in the Office of Surface Mining.

One of the most egregious examples of the testing program's overinclusiveness is the inclusion of 3000 employees in the Bureau of Indian Affairs schools in Teacher, Education Specialist and Guidance Counselor positions and 500 more in Education Aid positions. The BIA designated these positions despite the fact that not a single public school plan to require classroom teachers to undergo random urinalysis has withstood judicial review.

In addition, out of 345,000 positions identified for testing by 41 Federal agencies, the VA accounts for 130,000 of those positions, over one-third of the total number of employees to be tested nationwide. The Department of Health and Human Services, which also provides health services, has identified only 8,661 of its employees in the testing pool. In practical terms, VA's current struggle to recruit and retain health care employees will only intensify because of the broadness of its testing program. Health care employees who can receive higher pay and better benefits from other hospitals will be inclined to work elsewhere once VA compels employees to urinate on demand.

Additionally, NFFE believes that the Administration's drug testing program is improperly punitive rather than rehabilitative and, as such, is inconsistent with the letter and spirit of the Rehabilitation Act of 1973. The program merely provides that employees who test positive will be referred to the Employee Assistance Program. An employee who has a substance abuse problem should be given the opportunity to receive rehabilitation and treatment without fear of retribution or discipline. Under the Executive Order, however, an employee may be removed if he or she is found to have used an illegal drug after a first finding of drug use. Such a provision ignores the high rate of recidivism among drug abusers. Yet specialists recognize that there is still a strong potential for rehabilitation even if an employee initially "falls off the wagon."

In conclusion, let me just say that most of our concerns listed here today are not new. However, in the two and one-half years since the President's Commission on Organized Crime first proposed testing Federal workers at random for narcotics use, Congress has done little except to hold hearings and pass minor legislation to force HHS to promulgate basic scientific guidelines and require a cost estimate from the Office of Management and Budget.

What Federal workers need to combat this most humiliating of programs is strong Congressional leadership. One cannot help but wonder how long this program would last if Members of Congress were also forced to submit to random urinalysis.

We urge you and members of this subcommittee to move quickly to pass H.R. 280, the bill introduced by Congressman Gary Ackerman to ban drug testing except in cases of reasonable suspicion based on job impairment. We look forward to working with you to stop this flagrant violation of the rights of Federal workers.

Mr. **Sikorski**. Thank you. That is a good transition.

The subcommittees are going to continue; GAO is going to do some more work. We look forward to continuing our good relationship with the Office of Personnel Management and NIDA and continuing to flesh out some of these difficulties and hopefully resolve them.

I haven't seen a lot of movement, quite frankly, but there has been greater sensitivity. With the paperwork have come some modifications that have been respectful of the concerns that have been raised in the past. We have a long way to go.

The subcommittees thank you for your assistance so far. We look forward to working with you in the next couple of months, as we are considering a date sometime in August to look at these issues as well as the whole issue of the employment assistance programs, the EAP's, that remain out there as an unknown thus far.

Again, thank you all. The subcommittees are adjourned.

[Whereupon, at 1:35 p.m., the subcommittees were adjourned.]

Report to Congress

Report on Title VI of Public Law 99-570

The Federal Employee Substance Abuse Education and Treatment Act of 1986

April 1988

EXECUTIVE SUMMARY

INTRODUCTION

Pursuant to the requirements of the Federal Employee Substance Abuse Education and Treatment Act of 1986, the Office of Personnel Management (OPM) has prepared this second annual report to Congress on drug and alcohol abuse programs for Federal civilian employees. The report is based on information submitted to OPM from Federal agencies and reflects levels of activity in FY'87. The following is a summary of some of the major highlights in this year's annual report.

PROGRAM COST

The total government-wide operating cost for Employee Assistance Programs (EAPs) in FY'87 was $19,603,815, an increase of $2,310,365 (13%) from FY'86. These costs cover EAP services for assisting employees seeking to overcome drug, alcohol, emotional and other personal problems.

LEVEL OF EMPLOYEE UTILIZATION OF DRUG AND ALCOHOL ABUSE PROGRAMS

Drug Programs

Agencies reported that 4,242 employees were counseled for drug abuse for FY'87, a 15% increase over FY'86. This includes illegal and legal (i.e., prescription, over-the-counter, etc.) drugs. Of those employees counseled for drug abuse, 2,059 (49%) were helped by successfully completing a treatment program and returning to work and performing at an acceptable level. Agencies reported that 604 (14%) employees were not helped by a referral to EAP (i.e., employee refused or failed to complete treatment, performance did not improve, etc.). Agencies also reported that 1,579 (37%) employees who sought counseling and treatment in FY'87 were still enrolled in the program and could not determine whether they were helped.

Alcohol Programs

Agencies reported 13,403 employees were counseled for alcohol abuse and alcoholism in FY'87, up 1.8% from FY'86. Of those counseled, 8,498 (63%) employees who utilized the EAP services were helped by successfully completing a treatment program and returning to work and performing at an acceptable level. Agencies reported that 1,789 (13%) were not helped by a referral to EAP (i.e., employee refused or failed to complete treatment, performance did not improve, etc.). In addition, agencies reported that 3,116 (24%) employees were still enrolled in the program and could not determine whether they were helped.

TRAINING AND QUALIFICATIONS REQUIRED OF EAP PERSONNEL

Approximately 79% of the agencies employ administrators and counselors with advanced degrees in counseling or a related field. Most administrators and counselors have at least 2 or 3 years experience in counseling or a related field. Approximately 19% of all administrators and counselors have formal certification in alcohol and drug abuse counseling. Some agencies use medical personnel in their EAP.

OPM offered several training courses, briefings and seminars designed to improve the skills and knowledges of EAP administrators and their staffs.

PROMOTING EMPLOYEE AWARENESS AND UTILIZATION OF EAP SERVICES

Utilization of employee assistance program services for drug and alcohol abuse increased by approximately 4.7% from FY'86 to FY'87. Agencies reported using several methods to communicate to employees the availability, accessibility and confidentiality of EAP services. These include, but are not limited to, newsletters, pamphlets, posters, bulletin board notices, special briefings and seminars, supervisory handbooks, employee orientations and management and union briefings.

A memorandum was sent from the Director of OPM to the heads of Federal departments and agencies urging them to undertake efforts in their organizations to improve the visibility and effectiveness of EAP's.

SUPERVISORY TRAINING

Agencies report providing training to 152,570 supervisors and managers on how to effectively deal with employees who exhibit work performance attendance and/or conduct problems in the workplace. The focus of this training is on identifying and documenting unacceptable performance, attendance and/or conduct problems, referring employees to the EAP and follow-up activity.

OPM offered a course for managers and supervisors on maintaining a drug free Federal workplace in Washington, D. C. and all of its regional cities. This course was offered on 21 different occasions and was attended by Federal managers and supervisors from numerous Federal agencies.

EVALUATION OF EMPLOYEE ASSISTANCE PROGRAMS

Of the agencies covered by this report, 39% reported doing some type of internal evaluation to assess their programs for FY'87. The methods of evaluation ranged from supervisory/employee questionnaires and interviews to peer panel reviews of EAP service quality. OPM initiated evaluation projects in FY'87 designed to improve the quality of EAP services provided to Federal employees. The results of these projects, as carried out in FY'88, will be included in next year's annual report.

REPORT TO CONGRESS ON TITLE VI OF PUBLIC LAW 99-570 THE FEDERAL EMPLOYEE SUBSTANCE ABUSE EDUCATION AND TREATMENT ACT OF 1986

INTRODUCTION

The U. S. Office of Personnel Management (OPM) is required by P.L. 99-570, to report to Congress on drug and alcohol abuse programs for Federal civilian employees. Under § 7363 of the Act, these reports will include information on:

- the programs and services provided in the Federal sector, including the costs associated with each program or service;
- the training given to supervisory personnel in connection with recognizing the symptoms of drug and alcohol abuse and effectively dealing with substance abuse problems in the workplace;
- the training and qualifications required of personnel providing drug and alcohol abuse counseling services;
- the level of employee participation in programs designed to assist employees in overcoming substance abuse problems; and
- other related activities which OPM considers appropriate.

As required by the Act, the reports are to be submitted to Congress on an annual basis. This report is the second such report and is based on information submitted to OPM from Federal agencies covered by the Act. The data in this report reflects agency activity for FY 1987.

I. BACKGROUND

Under the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616) and the Drug Abuse and Treatment Act of 1972 (P.L. 92-255), Federal agencies are authorized to provide drug and alcohol counseling and treatment programs and services to civilian employees. On October 27, 1986, Congress enacted The Federal Employee Substance Abuse Education and Treatment Act of 1986 (P.L. 99-570) which requires Federal agencies to develop and maintain appropriate prevention, treatment and rehabilitation programs and services for drug and alcohol related problems among Federal civilian employees. In addition, the Act requires OPM, in cooperation with the President, the Department of Health and Human Services, and other agencies, to develop drug and alcohol abuse programs and services for Federal employees. OPM's regulations on drug and alcohol abuse programs and services for Federal civilian employees are located in the Code of Federal Regulations (5 C.F.R. Part 792) and Chapter 792 of the Federal Personnel Manual. These regulations address agency requirements for developing and maintaining drug and alcohol counseling and assistance programs for Federal civilian employees. Executive Order 12564 establishes the President's program for a drug-free Federal workplace. Pursuant to the Order, OPM issued policy guidance in the Federal Personnel Manual Letter 792-16 (November 28, 1986) which requires covered agencies to establish Employee Assistance Programs (EAPs) emphasizing education, prevention, short-term counseling and rehabilitation. The guidance also provides agencies with a model EAP in support of a drug-free Federal workplace.

II. DESCRIPTION OF FEDERAL DRUG AND ALCOHOL PROGRAMS

Functions

The basic functions of an agency Employee Assistance Program relating to alcohol and drug abuse include:

- problem identification, assessment and short-term counseling;
- referral for treatment and rehabilitation to an appropriate community or professional resource; and
- follow-up services to aid an employee in achieving an effective readjustment to his or her job during and after treatment.

In addition, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act Amendments of 1979 (P.L. 96-180) and the Drug Abuse Prevention, Treatment and Rehabilitation Amendments of 1979 (P.L. 96-181) authorize agencies to extend, to the extent feasible, program services to:

- families of employees who have alcohol or drug problems; and
- employees with family members who have alcohol or drug problems.

Operation

Each agency Employee Assistance Program has an administrator, coordinator or other official responsible for its overall operation and evaluation. Employee counseling staff work under the direction of the program administrator/coordinator and have responsibility for providing the day-to-day counseling services to employees and consultation services to supervisors and managers. Employee Assistance Programs are generally available to Federal employees, including those in field office locations. Depending on the size and location of a given installation, agencies operate their EAPs either through in-house programs or contracts with private sector providers of employee assistance services.

In-House Programs

Agencies with in-house programs usually hire full-time program administrators or coordinators to operate their Employee Assistance Programs. In smaller agencies, these duties are sometimes assigned collaterally to professional staff members from the personnel office such as employee relations specialists or other staff with employee health or counseling backgrounds. There can be several advantages to in-house employee assistance programs. First, program administrators and counselors are familiar with the agency's organizational structure, goals, culture and operating systems. Therefore, in-house EAP administrators and counselors often have a better understanding of employee and management needs. Second, program administrators and counselors are often more familiar with Federal policies and procedures and have a better understanding of how the EAP can support the agency's personnel management function. Third, it is often cost-effective for smaller agencies to assign EAP responsibilities to their personnel or employee health units as collateral duties when qualified staff exist.

The latest data at OPM's disposal indicates that approximately 60 - 65% of Federal agency EAPs are operated as in-house programs.

Contract Programs

Agencies often find it cost-effective to contract for EAP services. In some situations, the agency may lack in-house expertise or not employ enough employees to justify an in-house administrator or counselor. Single or multi-agency contracts for employee counseling and assistance services can also be established with private sector or non-profit organizations. Often a number of agencies combine their resources to provide counseling services to their employees through a joint contract. These multi-agency contracts are typically referred to as Cooperative Interagency Employee Counseling Services Programs or Consortia.

The basic services provided under contract arrangements are similar to in-house EAP programs (i.e., problem identification, short-term counseling, follow-up with treatment resources and return-to-work assistance for both employees and supervisors).

The latest data at OPM's disposal indicates that approximately 35 - 40% of Federal EAPs are operating under contract arrangement. The number of these programs vs. in-house programs appears to be growing for the reasons discussed below.

There are several advantages of contract arrangement for EAP services. A contract program usually engenders increased employee perceptions of confidentiality. Such a program also provides for highly qualified counselors who normally are required to have advanced degrees and a minimum of two years counseling experience. Because of their level of expertise in the substance abuse arena and the quality and availability of their resources, many contract providers can offer additional services to agency employees and managers such as training programs dealing with substance abuse and prevention and educational materials on the dangers of drug and alcohol abuse.

Contract arrangements are being increasingly utilized to provide EAP services to Federal employees working in remote locations or in small agency installations where in-house EAP programs would not be cost effective or feasible. In addition, contract arrangements can be cost effective because they can often be tailored to the specific needs of the agency and realize economics of scale because agency employees who utilize contract services are usually part of a larger pool of employees being served. Most contract arrangements have the added advantage of allowing the agency to quickly terminate the arrangement if the services provided are unsatisfactory.

Program Costs

The total government-wide operating costs for EAPs within the Federal sector are estimated to be $19,603,815 for FY'87, an increase of approximately 13% over FY '86. These costs cover EAP services for drug, alcohol, emotional and other personal problems. As with other data provided in this report, this cost estimate is derived from data submitted to OPM from agencies subject to P.L. 99-570. Each agency reports a separate estimated cost for its program (see listing in Chart I -- Agency-specific cost data). In viewing the cost data, it should be pointed out that (1) all costs associated with in-house programs are not easily identified because they usually are not separate budget line items, whereas contract costs are usually specifically identified and (2) each agency's resources are allocated differently depending on its organizational structure, size, composition, etc., and the cost figures provided reflect these differences to some degree. Therefore, agencies with similar employee populations or utilization rates may have somewhat different costs reported for their programs. Federal agencies pay for the cost of their EAPs from regular appropriations. Additional resources needed to enhance their programs are being absorbed by individual agencies.

The total government-wide operating cost for EAPs reflected above does not include drug testing costs. These costs are submitted in a separate report to Congress by the Office of Management and Budget (OMB) as required by P.L. 100-71, The Omnibus Supplemental Appropriations Act of 1987.

III. LEVEL OF EMPLOYEE UTILIZATION OF DRUG AND ALCOHOL ABUSE PROGRAMS

Drug Programs

Agencies reported that 4,242 employees were counseled for drug abuse for FY'87, a 15% increase over FY'86. Employees covered under this category include those with problems with all drugs except alcohol. This includes illegal and legal (i.e., prescription, over-the-counter, etc.) drugs. The total number of employees counseled for drug abuse in FY'87 represents a utilization rate of 0.19%, up 0.02% from FY'86. The increased emphasis by agencies on employee awareness and supervisory training (see discussion in Section V and Section VI) are possible explanations for the significant increase in drug-related EAP visitations in FY'87.

Of those employees counseled for drug abuse, 2,059 employees (49%) successfully availed themselves of EAP services (i.e., completed counseling, sought rehabilitation and treatment and performed acceptably following completion of the EAP program). Agencies reported that 604 (14% employees were not helped (i.e., the employee did not resume acceptable performance following counseling and/or treatment). Agencies reported that 1,579 (37%) employees who sought counseling and further treatment for drug abuse problems during FY'87 were still enrolled in the program and, therefore, could not determine whether or not they had been helped.

In comparing FY'86 and FY'87 statistics, the ratio of employees "helped" to those "not helped" in FY'87 (3½ to 1) was slightly higher than in FY'86 (3 to 1). In addition, the increase in the number of drug related referrals (15%) has apparently led to a higher percentage of employees still enrolled in the program (37% in FY'87 vs. 24% in FY 86). This, in turn, has resulted in the statistical outcome that the percentage of both "helped" and "not helped" has declined. In FY'87, 49% of employees counseled for drug abuse were helped as compared to 57% in FY'86, and 14% were not helped in FY'87 as compared to 19% in FY'86. However, for FY'88, it is likely that the percentage of employees in the helped category will increase as employees who were still enrolled in the program for FY'87 complete their program.

Of the 4,242 cases reported for FY'87, 2,388 (56%) of the cases were employee self-referrals to the EAP. Forty-four percent, or 1,854 of the cases were management-initiated referrals. Management-initiated referrals usually occur as a result of some deficiency in the employee's job performance (i.e., productivity, quality, conduct, attendance). These percentages are identical to the figures for FY'86 (see Charts III and IV). Of the drug-related referrals to EAP's, 135 occurred as a result of agency drug testing activities. This figure represents 3.2% of the total drug abuse cases referred to EAPs.

Alcohol Programs

Agencies reported that 13,403 employees were counseled for alcohol abuse and alcoholism in FY'87, a 1.8% increase over FY'86. The utilization rate for alcohol abuse and alcoholism cases is the same (0.60%) for FY'86/87. A total of 8,498 (63%) employees who utilized EAP services during FY'87 were helped (i.e., completed counseling, sought rehabilitation and treatment and performed acceptably following completion of an EAP program). A total of 1,789 (13%) employees were not helped (i.e., the employee did not resume acceptable performance following counseling and/or treatment). The ratio of employees "helped" to those "not helped" in FY'87 (4.7 to 1) was slightly higher than in FY'86 (4.1 to 1). Agencies reported that 3,116 (23%) employees who sought counseling and further treatment through EAPs in FY'87 were still enrolled in the program and, therefore, could not determine whether they had been helped. The percentage of employees still enrolled in the program is almost identical to FY'86.

Of the 13,403 cases reported for FY'87, 6,972 (52%) cases involved self-referral and 6,431 (48%) involved management-initiated referrals. This represents a slight increase (2%) in self-referrals and a slight decrease (2%) in management-initiated referrals over FY'86. Chart II contains a detailed accounting by agency of employee utilization of EAP services including services related to drug and alcohol problems.

NOTE: The number of cases and utilization rates discussed above include only those cases where employees received agency EAP services. These figures [illegible] not reflect employees who decided to seek private counseling and treatment for their problems. Such data is not available and would be extremely difficult to estimate.

IV. TRAINING AND QUALIFICATIONS REQUIRED OF EAP PERSONNEL

Agency Personnel

Employee Assistance Program administrators, coordinators and counselors who provide EAP services must be able to identify employee problems relating to alcohol and/or drug abuse, refer employees for treatment to appropriate community or private resources, assist employees in their rehabilitative efforts and return to satisfactory performance and help employees in maintaining abstinence from future substance abuse. More specifically, EAP personnel should possess qualifications and training in the following areas:

EAP Administrators/Coordinators

- Able to effectively implement the agency's EAP policy and program, including the implementation of programs for counseling and assisting employees with alcohol and drug abuse problems.
- Able to interpret and apply the laws, regulations and procedures which govern Federal EAP and related programs/services.
- Able to determine appropriate supervisory training and other activities needed to educate and inform the workforce about drugs and alcohol and the dangers of substance abuse.
- Able to develop and maintain counseling capability (through agency personnel or other counseling resources, including contracting out).
- Able to establish liaison with community education, treatment and rehabilitation facilities.
- Able to evaluate the program and report to management and OPM, as appropriate, on results and effectiveness.

Employee Assistance Counselors

- Able to communicate effectively with employees, supervisors and managers concerning substance abuse and its symptoms and consequences.
- Knowledgeable about community resources for treatment and rehabilitation of substance abusers including information on fees and payment schedules.
- Able to discuss drug treatment and rehabilitation insurance coverage available to employees through the Federal Employee Health Benefits Program.
- Able to distinguish the occasional user from the addicted user and to suggest the appropriate treatment based on that information.
- Able to provide training and education on drug and alcohol abuse to employees, supervisors, union representatives, etc.
- Knowledgeable about laws, regulations and procedures governing Federal EAPs and personnel actions that arise in the course of assisting employees who have drug and/or alcohol problems.

The following information was obtained from agencies who reported on the training and qualification requirements of their EAP staffs:

- Approximately 79% employ administrators and counselors with advanced degrees in counseling, employee health or a related field. In addition, approximately 19% of agency administrators and counselors have formal certification in substance abuse counseling.
- Most administrators and counselors have a minimum of 2 or 3 years of counseling or related experience with substance abuse problems.

The remaining agency-employed EAP officials have either medical backgrounds or receive on-the-job training in counseling supplemented by courses, seminars and other training related to substance abuse counseling.

OPM Training Programs and Related Initiatives

OPM conducts a training course entitled "Administering the Employee Counseling Services Program." This four day course is offered three times each year and is attended by Federal agency employees who have been newly appointed as administrators or coordinators and those in need of refresher training in EAPs. The course is evaluated and revised periodically to include the latest information and techniques related to effectively operating and evaluating EAPs and to returning employees with alcohol and drug abuse problems to acceptable levels of performance in the workplace.

OPM also holds quarterly meetings of the Interagency Advisory Group on Employee Health and Assistance which frequently feature presentations by national experts on drug and alcohol abuse including officials from the National Institute on Drug Abuse. These meetings are open to and regularly attended by agency EAP officials as well as personnelists with related responsibilities. Much of the discussion in these sessions and the OPM course for EAP administrators focuses on the identification and recognition of symptoms associated with alcohol and drug abuse. In addition, a great deal of discussion is devoted to successful means of referral to the EAP and follow-up by program officials.

OPM has also made special efforts to assist agencies in improving the drug and alcohol abuse components of their employee assistance programs by:

- developing and providing technical assistance in implementing a "model Employee Assistance Program" (outlined in FPM Letter 792-16) in support of a drug-free Federal workplace;
- publishing directories of treatment resources in major metropolitian areas for use by agency EAP counselors in referring employees with alcohol and drug abuse problems to appropriate treatment providers (a directory for the Washington, D. C. area has been published and OPM regional offices are developing similar treatment referral directories for other areas); and
- holding conferences and special briefings featuring expert speakers and up-to-date information on how substance abuse problems can be addressed through effective utilization of Employee Assistance Programs.

V. PROMOTING EMPLOYEE AWARENESS AND UTILIZATION OF EAP SERVICES

Promoting the visibility of EAPs is crucial to the success of any program. Without timely and accurate information about the availability, purpose, services and confidentiality requirements of the EAP, employee utilization of EAPs will suffer. Greater employee awareness and confidence in EAPs as a means of dealing with the complex issues of alcohol and drug abuse can increase the utilization of EAP services and lead to more successful outcomes. In this respect, agencies reported an increase of 4.7% (1.8% increase in alcohol-related referrals and 15% increase in drug-related referrals) in the utilization of Federal agency EAP services for substance abuse problems in FY'87 over FY'86.

Agencies engaged in a variety of efforts during FY'87 to communicate the availability, purpose and services provided by their EAPs. The methods used most frequently include:

- periodic memoranda from top management reminding employees of the purpose and availability of EAP services
- newsletters (agency and union)
- posters, pamphlets and brochures

- bulletin board notices
- agency sponsored seminars on drugs and alcohol
- employee orientations
- supervisory handbooks
- lunchtime awareness programs (i.e., drugs, alcohol, stress management, AIDS, etc.)
- special briefings and seminars for managers and employees on substance abuse-related topics
- wallet-size cards with EAP information
- combined management and union briefings

The Director of OPM sent a memorandum to heads of Federal agencies and departments urging them to take steps to increase the visibility and utilization of their organizations' EAP services dealing with substance abuse problems. Attached to the memorandum was an outline of the actions planned by OPM to improve the visibility and effectiveness of EAPs in the Federal sector (Appendix section contains copy of OPM Director's memorandum).

VI. SUPERVISORY TRAINING

Agency Efforts

Agency programs report that they are providing training to their supervisors and managers on how to effectively deal with employees who exhibit work performance, attendance and/or conduct problems that may reflect substance abuse problems. This training covers the following areas:

- Identifying and documenting performance, attendance and/or conduct deficiencies, assessing the nature and extent of these problems and counseling employees about these problems.
- Referring employees to the EAP, including adherence to confidentiality and Privacy Act requirements, when supervisors suspect that the

employee's performance, attendance and/or conduct deficiencies may be due to drug and/or alcohol abuse.

- Assisting employees in successfully returning to the workplace once they have completed counseling and/or treatment for their substance abuse problems.
- Explaining supervisory responsibilities under Federal laws and regulations, OPM policies and other external requirements governing employee drug and alcohol abuse programs.
- Applying practical advice from other supervisors on effective techniques and methods for dealing with employees experiencing substance abuse problems.

Most agencies incorporate from 3 to 6 hours of instruction in the above topics in their basic training courses for new supervisors and managers. Some agencies also offer specific workshops and short training sessions to their supervisors on various aspects of drug and alcohol abuse problems. In total, agencies reported that 152,570 supervisors and managers were given specific training in dealing with employees with known or suspected substance abuse problems. The range of training was quite broad and including the following type sessions:

- The Supervisor's Role in Dealing with Substance Abuse in the Workplace
- Alcohol and Drug Awareness
- The Agency Drug Testing Program
- Supervisory Referral to the Employee Assistance Program
- Management Consultation with the Employee Assistance Program
- Working with Troubled Employees
- Confronting the Problem Employee
- Cocaine Addiction
- Employee Counseling Service: A Supervisor's Alternative

OPM Efforts

During FY'87, OPM undertook several initiatives designed to assist agencies in providing supervisory training. Some of the major efforts included:

- Presenting a training course entitled "A Drug-free Workplace" for Federal supervisors and managers in Washington, D. C. and numerous regional locations. The course, which was offered by OPM a total of 21 times in FY'87, provides information on the most common types of drugs used and abused in the workplace and their associated symptoms. In addition, supervisors learn how to identify and effectively confront employees with work-related problems associated with drug and alcohol abuse and how to properly refer their employees to the agency's EAP.
- Issuing policy guidance and information to supervisors to assist them in understanding their legal obligations and management responsibilities in establishing a drug-free Federal workplace.
- Providing summaries of key decisions by Federal adjudicative agencies and the courts on the outcome of agency actions to deal with employees who engage in substance abuse-related misconduct.

VII. EVALUATION OF EMPLOYEE ASSISTANCE PROGRAMS

Agency Efforts

EAP administrators and coordinators are responsible for evaluating agency drug and alcohol programs to determine their effectiveness. These evaluations normally will include: services to employees with drug and alcohol abuse problems, referral procedures, supervisory training, employee orientation, agency reporting systems, availability and accessibility of EAPs, agency records systems, outreach activities and the effectiveness of agency personnel actions.

Thirty-nine percent of the agencies covered by the report engaged in some form of internal evaluation of their EAPs in FY'87. Some of the most common methods used by agency reviewers to evaluate the visibility and effectiveness of their EAPs include:

- use of steering committees to monitor EAP progress in meeting written objectives;
- use of supervisory and employee questionnaires and interviews to assess utilization, program availability and accessibility, supervisor/employee satisfaction with program services and overall program effectiveness;
- review of employee attendance records, accident records, disciplinary actions, number and type of grievances, etc., to assess program outcomes.
- review of performance evaluations of the EAP staff to assess the quality of program personnel providing EAP services.

The results of agency evaluation efforts are used in assessing program efficiency and effectiveness and applied in making improvements to EAP services. In addition, as part of their program review efforts, agencies compile and submit data to OPM to meet statutory reporting and evaluation requirements.

OPM Efforts

To supplement and encourage agency evaluation efforts, OPM initiated the following evaluation projects during FY'87 to improve the cost effectiveness of employee assistance programs.

- Developed a plan for the on-site evaluation of EAPs at approximately 550 Federal field office locations as part of OPM's ongoing program of personnel management evaluation. The evaluation, to be conducted in FY'88, is designed to assess agency EAP policies and instructions, qualifications of EAP staff, allocation of resources, EAP promotion efforts, EAP availability and accessibility and EAP outcomes such as the number of employees successfully completing treatment and returning to the job as fully productive members of the workforce. The results of the evaluation will provide valuable information on the current state of EAPs in the Federal sector.
- Began developing a model self-evaluation instrument to be used by Federal EAP administrators to assess the effectiveness of the policies, procedures and outcomes of their agencies' programs.

- Worked with the National Institute on Drug Abuse, Department of Health and Human Services, on revising and updating written EAP standards and criteria which will provide a better basis for developing, operating and evaluating agency EAPs.

VIII. CONCLUSIONS

Agencies are making strong commitments and significant progress in addressing substance abuse problems in the Federal workforce. This is evidenced by the 13% increase in financial resources devoted to Employee Assistance Programs and the 4.7% increase in substance abuse-related enrollments in Employee Assistance Programs in FY'87.

As agencies are required to do more with less resources, it becomes increasingly important for Federal managers and supervisors to have a fully productive workforce. As supervisors more actively confront the adverse effects drug and alcohol abuse have on employee productivity, it is likely that the level of employee utilization of EAPs will continue to increase.

Agency drug testing programs resulted in a small number of management initiated referrals to EAPs. As agencies continue implementing the President's drug free Federal workplace program during FY'88 there will probably be an increasing number of such referrals to EAPs.

OPM has been and continues to remain committed to assisting Federal agencies in the development, implementation and evaluation of their EAPs. OPM's primary objective is to promote improved EAP services in the Federal sector as a means of achieving increased productivity, health and quality of life for Federal employees.

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

Office of the Director

OCT 27 1987

MEMORANDUM FOR HEADS OF DEPARTMENTS AND INDEPENDENT AGENCIES

From: Constance Horner
Director

Constance Horner

Subject: Strengthening Employee Assistance Programs for Treatment of Drug Abuse

In his Executive Order 12564, A Drug-Free Federal Workplace, President Reagan said that the Federal government "can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace."

Recent publicity has focused on the Government's program for testing Federal employees in sensitive positions as a means of deterring use of illegal drugs and identifying employees with drug problems. Testing, however, is only part of the President's drug-free Federal workplace initiative. As the President has emphasized, the basic goal of the initiative is to extend a helping hand to employees who are willing and able to conquer their drug problems. Successful rehabilitation and return of employees to productive roles in the Federal workplace are more than a humanitarian gesture; they make good management sense to retain the skills of experienced, capable workers.

In FY 1986, agencies reported to OPM that a sizable majority of Federal workers who received Employee Assistance Program (EAP) services for drug abuse problems completed treatment and returned to being acceptable performers. Clearly, for those employees who were aware of available EAP services and chose to use them, positive results were achieved. Yet, we know that not all employees have access to such services or know that they exist and can be used with confidence and confidentiality.

Both E.O. 12564 and the Anti-Drug Abuse Act of 1986 (P.L. 99-570) require that agencies maintain programs aimed at preventing and treating drug abuse. Consistent with the policies in the Executive Order and the law, I ask you to assess your agency's Employee Assistance Program to ensure that it is well-known and available to all employees and is effective in helping employees with substance abuse problems. As part of that assessment, I urge you to clearly communicate your support to the EAP at all levels of your organization. We can build on our good record of assistance so that all Federal workers with drug, alcohol and other problems affecting performance can be helped.

OPM is pursuing a plan to strengthen the effectiveness and visibility of EAP's in the Federal workplace. Some of the major activities in the plan are described in the attachment to this letter. We look forward to working with you in carrying out these initiatives and we are interested in your ideas for strengthening EAP's. Please feel free to encourage your EAP staff to contact OPM's Employee Health Services unit at (202) 632-5558 to discuss ideas and questions.

Attachment

Attachment

INITIATIVES TO STRENGTHEN EMPLOYEE ASSISTANCE PROGRAMS

One-day EAP Conference: In early 1988, OPM will hold a one-day conference entitled "Beyond Testing: The Responsibility to Help." The conference will explore EAP's as a management resource for helping employees who have been identified as using illegal drugs. It will focus on successful programs in Government and the private sector, and will examine some major concerns for managers and EAP officials, including the questions of confidentiality and personal liability, as well as what should be done when treatment fails.

Model Employee Assistance Program: FPM Letter 792-16 (November 26, 1986) presents a Model Employee Assistance Program that agencies may use both to improve existing programs and to ensure that essential criteria are included when new EAP's are established. A sample policy statement, legal authorities, program responsibilities, roles of EAP coordinators and counselors, training and education requirements for EAP personnel, and the relationship between the EAP and the drug testing program are among the topics included in the Model.

Evaluation of EAP's: In FY 1988, OPM will conduct a nationwide evaluation of the scope and effectiveness of EAP's in agency field installations. Agencies will receive feedback on evaluation results and OPM will provide follow-up monitoring. In addition, in conjunction with the National Institute on Drug Abuse (NIDA) and the Interagency Advisory Group (IAG) Committee on Alcohol and Drug Abuse, OPM is developing an evaluation instrument that agencies can use to conduct comprehensive self-evaluations of their EAP's.

EAP Publications: OPM's Directory of Treatment Resources in the Washington, D. C. Area is being updated and will be distributed shortly, as will a new brochure that broadly describes Federal employee health and assistance programs. The latter publication is being prepared for use in employee orientation, training, conferences and other instances where agencies might find it useful.

EAP Training: OPM conducts courses for managers and supervisors on drug abuse policy and associated problems, including information about assistance programs and their role in rehabilitating workers. OPM also offers a course focused solely on employee counseling and assistance program administration. Both courses are offered in Washington, D. C. and OPM regions several times each year. For more information, agencies may call (202) 632-5671.

Chart I—Utilization and Costs of Agency EAP Programs* FY 1987

Agency	Total Employees	Alcohol Cases	Drug Cases	Other Cases	Total Cases	Total Operating Costs
EXECUTIVE DEPARTMENTS						
Agriculture	113,179	410	81	1,949	2,440	$612,253
Air Force	264,330	1,894	390	543	2,827	$1,548,744
Army	412,293	2,641	615	5,034	8,290	$3,069,670
Commerce	31,541	87	40	590	717	$278,501
Defense	109,574	515	194	1,750	2,459	$945,736
Education	4,983	12	3	32	47	$37,014
Energy	15,192	91	28	480	599	$236,870
Health and Human Services	121,924	591	218	3,871	4,680	$2,056,503
Housing and Urban Development	12,267	27	14	232	273	$101,705
Interior	58,513	119	37	1,167	1,323	$512,260
Justice	66,703	345	46	2,097	2,488	$927,006
Labor	17,657	44	17	249	310	$124,360
Navy	300,657	2,210	928	5,111	8,249	$2,235,290
State	22,565	229	51	1,119	1,399	N/A
Transportation	62,435	233	106	1,503	1,842	$805,307
Treasury	149,187	555	244	4,588	5,387	$1,294,398
INDEPENDENT AGENCIES						
ACTION	472	1	1	9	11	$4,834
Administrative Office of the U.S. Courts	567	0	1	33	34	$7,589
Board of Governors, Federal Reserve System	1,484	0	3	41	44	$18,175
Commodity Futures Trading Commission	526	2	0	10	12	0
Consumer Product Safety Commission	527	0	1	0	1	$15,000
Environmental Protection Agency	15,278	36	21	819	876	$214,231
Equal Employment Opportunity Commission	3,278	7	4	11	22	$43,576
Export-Import Bank	294	1	0	0	1	$3,600
Farm Credit Administration	554	2	0	8	10	$3,645
Federal Communications Commission	1,877	4	12	54	70	$26,899
Federal Deposit Insurance Corporation	9,592	83	46	538	667	$206,000
Federal Election Commission	250	0	0	1	1	$2,000
Federal Emergency Management Agency	2,216	10	2	59	71	$15,167
Federal Energy Regulatory Commission	1,571	59	15	4	78	$11,050
Federal Home Loan Bank Board	941	2	4	9	15	$25,000
Federal Labor Relations Authority	260	2	2	9	13	$4,011
Federal Maritime Commission	215	3	1	5	9	$2,683
Federal Mediation and Conciliation Service	328	1	0	0	1	$11,725
Federal Trade Commission	1,023	0	5	61	66	$19,292
General Services Administration	21,470	96	40	271	407	$171,547
Inter-American Foundation	75	0	0	0	0	$1,800
International Trade Commission	490	2	2	2	6	$6,612
Interstate Commerce Commission	731	2	0	2	4	$1,000
Merit Systems Protection Board	314	0	0	8	8	$3,841
National Aeronautics and Space Administration	21,850	146	85	1,068	1,299	$490,080
National Archives and Records Administration	3,153	29	5	88	122	$26,857
National Capital Planning Commission	42	0	0	0	0	0
National Credit Union Administration	806	1	0	0	1	$3,200

Continued on Next Page

Chart I—Utilization and Costs of Agency EAP Programs* *Continued*
FY 1987

Agency	Total Employees	Alcohol Cases	Drug Cases	Other Cases	Total Cases	Total Operating Costs
INDEPENDENT AGENCIES *Continued*						
National Endowment for the Humanities	259	0	0	7	7	$3,825
National Gallery of Art	851	34	17	16	67	$28,480
National Guard	51,336	234	39	197	470	$165,972
National Labor Relations Board	2,350	3	2	11	16	$81,780
National Science Foundation	1,213	2	0	10	12	$5,029
National Transportation Safety Board	336	3	1	9	13	$7,800
Nuclear Regulatory Commission	3,558	7	2	30	39	$75,000
Occupational Safety and Health Review Commission	76	0	0	1	1	$1,023
Office of Management and Budget	576	1	0	4	5	N/A
Office of Personnel Management	6,325	14	7	79	100	$44,047
Office of the Special Counsel	69	0	0	0	0	$500
Overseas Private Investment Corporation	132	0	0	0	0	$3,800
Panama Canal Commission	8,581	79	45	21	145	$116,853
Peace Corps	427	1	0	5	6	$330
Railroad Retirement Board	1,640	7	2	52	61	$17,385
Securities and Exchange Commission	1,943	2	0	5	7	$4,142
Selective Service System	118	0	0	2	2	$1,637
Small Business Administration	3,519	13	3	93	109	$37,898
Smithsonian Institution	5,800	102	24	110	236	$38,000
Soldiers' and Airmen's Home	1,044	5	0	0	5	$32
Tennessee Valley Authority	32,866	344	65	392	801	$434,448
U.S. Information Agency	4,422	34	8	255	297	$60,000
Veterans Administration	239,121	1,958	735	5,002	7,695	$1,863,955
LEGISLATIVE BRANCH						
General Accounting Office	5,200	14	5	534	553	$247,000
Government Printing Office	4,600	26	14	130	170	$87,400
Library of Congress	4,945	27	7	254	288	$141,204
U.S. Tax Court	327	1	4	34	39	$11,442
TOTALS	**2,234,818**	**13,403**	**4,242**	**40,678**	**58,323**	**$19,003,815**

*The cost estimates stated here are strictly agency costs and do not reflect employee costs for counseling/treatment/rehabilitation.

N/A—Cost not available.

Chart II—Level of Employee Participation in Agency EAP Programs
FY 1987

Agency	Total Employees	ALCOHOLISM Cases	ALCOHOLISM % Utilization	ALCOHOLISM No. Helped	ALCOHOLISM Self Refer	ALCOHOLISM Mgmt. Refer	DRUG ABUSE Cases	DRUG ABUSE % Utilization	DRUG ABUSE No. Helped	DRUG ABUSE Self Refer	DRUG ABUSE Mgmt. Refer
EXECUTIVE DEPARTMENTS											
Agriculture	113,179	410	0.36	315	171	239	81	0.07	42	55	26
Air Force	264,330	1,894	0.72	1,261	690	1,204	390	0.15	121	147	243
Army	412,293	2,641	0.64	1,747	1,750	891	615	0.15	331	389	226
Commerce	31,541	87	0.28	56	47	40	40	0.13	17	22	18
Defense	109,574	515	0.47	248	255	260	194	0.18	100	131	63
Education	4,983	12	0.25	5	5	7	3	0.06	0	1	2
Energy	15,192	91	0.60	59	25	66	28	0.18	15	13	15
Health and Human Services	121,924	591	0.48	383	314	277	218	0.18	117	109	109
Housing and Urban Development	12,267	27	0.22	11	13	14	14	0.11	9	8	4
Interior	58,513	119	0.20	66	81	38	37	0.06	17	18	19
Justice	66,703	345	0.52	227	189	156	46	0.07	27	22	24
Labor	17,657	44	0.25	15	19	25	17	0.10	6	6	11
Navy	300,567	2,210	0.74	1,199	982	1,228	928	0.31	479	508	420
State	22,565	229	1.01	180	107	122	51	0.23	44	43	8
Transportation	62,435	233	0.37	125	169	64	106	0.17	35	63	43
Treasury	149,187	555	0.37	309	345	210	244	0.16	93	171	73
INDEPENDENT AGENCIES											
ACTION	472	1	0.21	1	0	1	1	0.21	0	0	1
Administrative Office of the U.S. Courts	567	0	0.00	0	0	0	1	0.18	0	0	1
Board of Governors, Federal Reserve System	1,484	0	0.00	0	0	0	3	0.20	3	3	0
Commmodity Futures Trading Commission	526	2	0.38	1	0	2	0	0.00	0	0	0
Consumer Product Safety Commmission	527	0	0.00	0	0	0	1	0.19	1	0	1
Environmental Protection Agency	15,278	36	0.24	26	17	19	21	0.14	11	13	8
Equal Employment Opportunity Commission	3,278	7	0.21	6	5	2	4	0.12	3	2	2
Export-Import Bank	294	1	0.34	1	1	0	0	0.00	0	0	0
Farm Credit Administration	554	2	0.36	0	2	0	0	0.00	0	0	0
Federal Communications Commission	1,877	4	0.21	3	2	2	12	0.64	3	4	8
Federal Deposit Insurance Corporation	9,592	83	0.87	57	61	22	46	0.48	24	24	22
Federal Election Commission	250	0	0.00	0	0	0	0	0.00	0	0	0
Federal Emergency Management Agency	2,216	10	0.45	6	1	9	2	0.09	0	0	2

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Chart II—Level of Employee Participation in Agency EAP Programs *Continued*

FY 1987

Agency	Total Employees	ALCOHOLISM Cases	ALCOHOLISM % Utilization	ALCOHOLISM No. Helped	ALCOHOLISM Self Refer	ALCOHOLISM Mgmt. Refer	DRUG ABUSE Cases	DRUG ABUSE % Utilization	DRUG ABUSE No. Helped	DRUG ABUSE Self Refer	DRUG ABUSE Mgmt. Refer
INDEPENDENT AGENCIES *Continued*											
Federal Energy Regulatory Commission	1,571	59	3.76	49	20	39	15	0.95	10	0	15
Federal Home Loan Bank Board	941	2	0.21	1	2	0	4	0.43	2	4	0
Federal Labor Relations Authority	260	2	0.77	2	2	0	2	0.77	1	2	0
Federal Maritime Commission	215	3	1.40	3	2	1	1	0.47	1	1	0
Federal Mediation and Conciliation Service	328	1	0.30	1	0	1	0	0.00	0	0	0
Federal Trade Commission	1,023	0	0.00	0	0	0	5	0.49	3	1	4
General Services Administration	21,470	96	0.45	47	46	50	40	0.19	24	25	15
Inter-American Foundation	75	0	0.00	0	0	0	0	0.00	0	0	0
International Trade Commission	490	2	0.41	1	1	1	2	0.41	0	1	1
Interstate Commerce Commission	731	2	0.27	0	2	0	0	0.00	0	0	0
Merit Systems Protection Board	314	0	0.00	0	0	0	0	0.00	0	0	0
National Aeronautics and Space Administration	21,850	146	0.67	98	90	56	85	0.39	49	54	31
National Archives and Records Administration	3,153	29	0.92	12	15	14	5	0.16	4	5	0
National Capital Planning Commission	42	0	0.00	0	0	0	0	0.00	0	0	0
National Credit Union Administration	806	1	0.12	1	1	0	0	0.00	0	0	0
National Endowment for the Humanities	259	0	0.00	0	0	0	0	0.00	0	0	0
National Gallery of Art	851	34	4.00	24	22	12	17	2.00	14	6	11
National Guard	51,336	234	0.46	153	94	140	39	0.08	21	24	15
National Labor Relations Board	2,350	3	0.13	1	0	3	2	0.09	0	1	1
National Science Foundation	1,213	2	0.16	0	2	0	0	0.00	0	0	0
National Transportation Safety Board	336	3	0.89	3	3	0	1	0.30	1	1	0
Nuclear Regulatory Commission	3,558	7	0.20	5	4	3	2	0.06	0	12	1
Occupational Safety and Health Review Commission	76	0	0.00	0	0	0	0	0.00	0	0	0
Office of Management and Budget	576	1	0.17	0	1	0	0	0.00	0	0	0
Office of Personnel Management	6,325	14	0.22	11	7	7	7	0.11	4	5	2
Office of the Special Counsel	69	0	0.00	0	0	0	0	0.00	0	0	0
Overseas Private Investment Corporation	132	0	0.00	0	0	0	0	0.00	0	0	0
Panama Canal Commission	8,581	79	0.92	51	31	48	45	0.52	14	13	32
Peace Corps	427	1	0.23	0	0	1	0	0.00	0	0	0
Railroad Retirement Board	1,640	7	0.43	3	4	3	2	0.12	1	2	0
Securities and Exchange Commission	1,943	2	0.10	1	1	1	0	0.00	0	0	0

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Chart II—Level of Employee Participation in Agency EAP Programs *Continued*
FY 1987

Agency	Total Employees	ALCOHOLISM Cases	ALCOHOLISM % Utilization	ALCOHOLISM No. Helped	ALCOHOLISM Self Refer	ALCOHOLISM Mgmt. Refer	DRUG ABUSE Cases	DRUG ABUSE % Utilization	DRUG ABUSE No. Helped	DRUG ABUSE Self Refer	DRUG ABUSE Mgmt. Refer
INDEPENDENT AGENCIES *Continued*											
Selective Service System	118	0	0.00	0	0	0	0	0.00	0	0	0
Small Business Administration	3,519	13	0.37	8	6	7	3	0.09	2	2	1
Smithsonian Institution	5,800	102	1.76	84	20	82	24	0.41	10	1	23
Soldiers' and Airmen's Home	1,044	5	0.48	4	1	4	0	0.00	0	0	0
Tennessee Valley Authority	32,866	344	1.05	271	155	189	65	0.20	51	19	46
U.S. Information Agency	4,422	34	0.77	19	13	21	8	0.18	4	1	7
Veterans Administration	239,121	1,958	0.82	1,307	1,160	798	735	0.31	335	449	286
LEGISLATIVE BRANCH											
General Accounting Office	5,200	14	0.27	4	3	11	5	0.10	0	2	3
Government Printing Office	4,600	26	0.57	13	6	20	14	0.30	7	10	4
Library of Congress	4,945	27	0.55	13	7	20	7	0.14	0	2	5
U.S. Tax Court	327	1	0.31	1	0	1	4	1.22	3	4	0
TOTALS	**2,234,818**	**13,403**	**0.60**	**8,496**	**6,972**	**6,431**	**4,242**	**0.19**	**2,058**	**2,388**	**1,854**

Chart III—Comparison of Agency EAP Cost and Utilization FY '86/87

	FY '86	FY'87	% Change
Total Employees	2,196,754	2,234,818	+2.0
Alcohol Cases	13,167	13,403	+1.8
Drug Cases	3,690	4,242	+15.0
Emotional/Other	39,765	40,678	+2.3
Total Cases	56,622	58,323	+3.0
Total Operating Costs	$17,293,450	$19,603,815	+13.0

Chart IV—Comparison of Alcohol and Drug Abuse Program Utilization FY '86/87

	FY '86	FY'87
Alcoholism Cases	13,167	13,403
Utilization Rate (%)	0.60	0.60
Number Helped	8187 (62%)	8498 (63.3%)
Number Not Helped	1975 (15%)	1789 (13.3%)
Too Early to Tell	3005 (23%)	3116 (23.3%)
Self Refer	6543 (50%)	6972 (52%)
Management Refer	6624 (50%)	6431 (48%)
Drug Cases	3690	4242
Utilization Rate (%)	0.17	0.19
Number Helped	2111 (57%)	2059 (49%)
Number Not Helped	706 (19%)	604 (14%)
Too Early to Tell	873 (24%)	1579 (37%)
Self Refer	2083 (56%)	2388 (56%)
Management Refer	1607 (44%)	*1854 (44%)

*Of the management-initiated referrals reported, 135 were based on the results of a drug test.